Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TURBOMECA, S.A., and TURBOMECA ENGINE COMPANY,
Petitioners,

v.

KYONG JU BARNETT, Individually and as Guardian Ad Litem and Next Friend of JESSIE MORGAN BARNETT, and MIA KYONG BARNETT, minor children; JAMES S. BARNETT, SR.; WANDA BARNETT; and STATE OF MISSOURI,
Respondents.

On Petition for Writ of Certiorari
to the Missouri Court of Appeals, Western District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE MISSOURI COURT OF APPEALS' IMPOSITION OF $26,500,000 IN PUNITIVE DAMAGES VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHERE (a) PETITIONERS HAD NO NOTICE THAT MISSOURI WOULD EXACT SUCH A SEVERE PENALTY FOR THE FIRST INCIDENT OCCURRING IN THAT STATE, (b) THE CONDUCT PUNISHED OCCURRED ALMOST ENTIRELY IN OTHER STATES OR COUNTRIES, (c) THE PUNITIVE ASSESSMENT CONSTITUTES MORE THAN 21% OF ONE PETITIONER'S NET WORTH AND IS MORE THAN SEVEN TIMES THE OTHER'S NET WORTH, AND (d) THE SAME COURT AT THE SAME TIME IMPOSED AN ADDITIONAL $26,500,000 IN PUNITIVE DAMAGES AGAINST PETITIONERS IN A COMPANION CASE FOR THE SAME CONDUCT?

II. DID THE PUNITIVE DAMAGE ASSESSMENT VIOLATE THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT IN THAT 50% OF THE PUNITIVE DAMAGES, LESS FEES AND EXPENSES, IS PAYABLE TO THE STATE OF MISSOURI PURSUANT TO MO. REV. STAT. §537.675.2 (1994)?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Turbomeca, S.A. ("TSA"), and Turbomeca Engine Corp. ("TEC") hereby request this Court to issue a writ of certiorari to review the judgment of the Missouri Court of Appeals, Western District, entered in this case.[1/]

OPINIONS BELOW

The en banc opinion of the Missouri Court of Appeals, Western District, is reported at 963 S.W.2d 639 and is reproduced in the Appendix to this petition beginning at page A-1.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Missouri Court of Appeals, Western District, were filed on November 25, 1997. Petitioners filed timely petitions for rehearing and for transfer to the Missouri Supreme Court, which were denied by the Court of Appeals on January 27, 1998. Petitioners then filed a timely Application for Transfer in the Missouri Supreme Court, which denied discretionary review on March 24, 1998 (Apdx. p. A-56). This petition is being filed within 90 days of March 24, 1998. Jurisdiction in this Court is founded on 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Missouri Revised Statutes (1994):

Section 537.090. "Damages to be determined by jury — factors to be considered. In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus

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[1/] Pursuant to Supreme Court Rule 29.6, petitioners state they have no parent-subisidary relationship between themselves but are both indirect subsidiaries of Labinal, S.A., a French corporation. Neither petitioner has any subsidiaries that are not wholly owned.

occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss. In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued. The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts, but damages for grief and bereavement by reason of the death shall not be recoverable."

Section 537.675.2. "Fifty percent of any final judgment awarding punitive damages after the deduction of attorneys' fees and expenses shall be deemed entered in favor of the State of Missouri."

Section 510.263.4. "Within the time for filing a motion for new trial, a defendant may file a post-trial motion requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based."

STATEMENT OF THE CASE

Introduction

This is a civil action for wrongful death in which a jury in the Circuit Court of Jackson County, Missouri, returned a record-setting verdict against petitioners for $175,000,000 in compensatory damages and $175,000,000 in damages for "aggravating circumstances," or punitive damages. On petitioners' post-trial motions, the trial court ordered a remittitur of $150,000,000 in compensatory damages and $87,500,000 in aggravating circumstances damages, which remittitur was accepted by respondents. After crediting petitioners under Mo. Rev. Stat. §510.263.4 (1994) for $35,000,000 due to aggravating circumstances damages previously awarded in the companion case of *Letz v. Turbomeca, S.A.*, which arose from the same helicopter accident, the trial court entered a final judgment for $25,000,000 in compensatory damages, jointly and severally against the two petitioners, and for damages for aggravating circumstances of $45,000,000 against petitioner TSA, and $7,500,000 against petitioner TEC.

On appeal to the Missouri Court of Appeals, Western District, the court en banc rejected numerous assertions of trial error and affirmed the jury's finding of liability but determined that the damages, as remitted, were still excessive. The court decided that no more than $3,500,000 in compensatory damages was justifiable and that damages for aggravating circumstances, or punitive damages, should be remitted to $26,500,000.[2/] The court also decided the *Letz* appeal simultaneously and there entered a remittitur reducing the total award in that case from $70,000,000 to $2,500,000 in compensatory damages and another $26,500,000 in punitive damages.

[2/] The Court of Appeals' opinion, reported at 963 S.W.2d 639, is reproduced in the Appendix to this Petition.

Following the issuance of the opinions in both *Letz* and *Barnett*, petitioners filed timely Motions for Rehearing or to Transfer to the Missouri Supreme Court. Those motions were denied by the Court of Appeals. Petitioners then sought review in the Missouri Supreme Court by filing in that court Applications for Transfer. On March 24, 1998, the Supreme Court of Missouri accepted transfer in *Letz* but denied review in this case (Apdx. p. A-56). The mandate of the Court of Appeals thereafter issued in this case, and pursuant to that mandate, respondents accepted the remittitur in lieu of a new trial.

The trial court on remand joined the State of Missouri as a party because of its entitlement to share in the punitive damage award under Missouri law. An amended final judgment was entered on April 28, 1998. On the same day, petitioners paid the judgment, plus prejudgment interest of more than $10.5 million, under the threat of execution against the $134,000,000 supersedeas bond that had been posted in connection with the appeal. The final judgment, as paid, is reproduced at pages A-57 to A-64 of the Appendix.[3/]

Relevant Background Facts

The private respondents are the wife, parents and two children of James Barnett, Jr., who died May 27, 1993, when the Life Flight 2 helicopter he was piloting for Rocky Mountain Helicopters suffered an in-flight engine failure and crash landed in a field

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[3/] The ultimate paragraph of the April 28 judgment ordered that if petitioners did not "satisfy this final judgment in full on this date then Plaintiff's Motion for Execution of Judgment on Appeal Bond shall be sustained forthwith and Plaintiffs shall have and collect upon that judgment against St. Paul Fire & Marine Insurance Company" (Apdx. p. A-64).

near Cameron, Missouri. Pilot Barnett and a passenger, Sherry Letz, were fatally injured.[4/]

Petitioner TSA is a French company that manufactured a component part for Turbomeca engines known as the TU-76 nozzle guide vane ("NGV"). Petitioner TEC is a corporation located in Texas which sells and services Turbomeca engines in a territory that includes the United States. In June 1989, TEC installed a TU-76 in the module eventually used in the engine on the Life Flight 2 helicopter.

The evidence at trial showed that the TU-76 had been in worldwide service since 1982 and through the end of 1992 had logged approximately 3,000,000 hours of flight time (Ex. 8). Respondents established that TSA first became aware of a potential cracking problem in the TU-76 in 1986 and began research on a replacement NGV. Petitioner TSA sent a series of advisories to its customers notifying them to perform a compulsory check at least once a day for a rubbing noise in the gas generator assembly of any engine containing a TU-76 (Exs. 68, 69, 602, 603, 604).

Following three failed attempts to correct the problem with the TU-76, TSA in November 1990 eventually obtained certification from the French airworthiness authorities for the replacement TU-197 and TU-202 NGVs and began installing them at regular maintenance overhauls.

Internal records kept by TSA showed that during the 3,000,000 hours of flight time there had been only six prior in-flight engine stoppages, beginning in 1989, attributable to the TU-76 (Ex. 8, p.2). In those six incidents, two passengers were injured in 1989

[4/] The State of Missouri is joined as a respondent because it received proceeds of $4,742,199 from the punitive judgment pursuant to Mo. Rev. Stat. §537.675.2. References to "respondents" in this petition are to the private respondents.

in Bolivia, and three passengers were very slightly injured in a 1991 accident in Portugal (Ex. 269). No fatalities had occurred.

Other documents introduced by respondents suggested that there were additional incidents of cracking found in TU-76s beyond the six prior in-flight shutdowns shown by TSA's records. Even though some of those incidents did not involve in-flight stoppages and none of them produced injuries or death, respondents' theory of the case was that in reports to the FAA made *after* the Life Flight 2 accident, TSA did not list all previous incidents and thereby misled the United States Government and willfully endangered American lives. All the incidents cited occurred outside the State of Missouri and, for the most part, outside the United States.

Respondents' decedent was a 40-year-old pilot who was earning about $34,000 annually at the time of his death (Tr. 1239). Their damage expert calculated the economic loss to respondents at $649,080 (Tr. 1267, Ex. 285).

In urging the jury to find petitioners liable for punitive damages, respondents' counsel argued that TSA had supposedly saved $48,000,000 by not recalling the TU-76 worldwide and asked the jury to find that petitioners were guilty of conscious disregard for safety (Tr. 2658). Despite the fact that there had never been a previous fatal accident attributed to the TU-76, counsel told the jury that TSA had arbitrarily decided "who would be safe and would not be safe" (Tr. 2703). He emphasized that "they're still flying it around the world" (Tr. 2704) and argued that petitioners had lied about the number of prior incidents (Tr. 2704).

The determination of the amount of punitive damages was bifurcated. After the jury had awarded an astonishing $175,000,000 in compensatory damages, they were shown Exhibit 535A, which indicated that TSA's net worth was $122,565,470 (Tr. 2771). In his closing argument in the second

phase, respondents' counsel implored the jury to "send a message so loud and so clear and so strong that it makes the headlines of Paris, New York and London; United States jury puts their foot down. No more dangerous products in the United States" (Tr. 2775). Referring to gross sales figures, rather than net worth, he said, "They made half a billion dollars" and asked the jury to impose additional damages of $200,000,000 (Tr. 2776). After deliberating less than an hour, the jury returned additional verdicts for aggravating circumstances (punitive damages) of $150,000,000 against TSA and $25,000,000 against TEC (Tr. 2792-94).

Post-Trial Proceedings

The trial court remitted the verdict to a total of approximately $130,000,000 and applied a credit under Missouri law for the punitive damages previously awarded in *Letz*. Petitioners then appealed to the Missouri Court of Appeals, which heard both cases en banc. Petitioners had asserted their constitutional objections to the punitive damages award before the trial court in post-trial motions. See Joint Motion of Defendants Turbomeca, S.A., and Turbomeca Engine Corporation to Set Aside Verdict, *etc.*, filed Aug. 24, 1995, in Jackson County Circuit Court, No. CV93-24644, pp. 7-19, 69-79, and Suggestions in Support, pp. 16-36, 68-73. Those issues were also argued at length in Point IX of their brief to the Court of Appeals. See Brief for Appellants, No. W.D. 51980, pp. 85-97.

The Court of Appeals in *Barnett* rejected the numerous claims of error made by petitioners but concluded that the damage awards, even as remitted by the trial court, were still excessive. Emphasizing the problems experienced by the TU-76 in other states and countries, the Court of Appeals found that petitioners' conduct was "reprehensible," within the meaning of *BMW v. Gore*, 116 S. Ct. 1589 (1996), and that the total damages should be fixed, jointly and severally, at $3,500,000 compensatory and $26,500,000 punitive, or a new trial held on damages. At the

same time, the court affirmed the result in *Letz* but likewise remitted that judgment to $2,500,000 in actual damages and $26,500,000 additional punitive damages. The Court said that because the cases were being decided contemporaneously, the "credit" provision of Missouri law was not applicable, so that the total punitive damages payable by petitioners would be $53,000,000. See Apdx. pp. A-50 to A-54.

The Missouri Supreme Court granted petitioners' application for transfer in *Letz*, and that case is currently being briefed and will be argued in the fall of 1998.[5] Discretionary review in this case was denied by the Missouri Supreme Court on March 24, 1998, and after respondents accepted the remittitur, petitioners paid the judgment to prevent further accrual of nine percent (9%) interest and to avoid execution pursuant to respondents' "Motion for Execution of Judgment on Appeal Bond."[6]

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[5] The *Letz* opinion is not officially reported and was vacated by operation of law when the Supreme Court accepted transfer. It can be found at 1997 WL 727544.

[6] The fact that the judgment has been paid under threat of execution does not foreclose review by this Court. *Cahill v. New York, N.H. & H. R. Co.*, 351 U.S. 183, 184 (1956) (payment of money judgment does not render case moot); *Dakota Co. v. Glidden*, 113 U.S. 222, 224 (1885) ("[t]here can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money"). A payment is not voluntary if the defendant pays the judgment under threat of execution, *Rosenblum v. Jacks or Better of America West, Inc.*, 745 S.W.2d 754, 764 (Mo. App. 1988), or to stop the accrual of interest and costs, *United States ex rel. H&S Indus., Inc. v. F.D. Rich Co.*, 525 F.2d 760, 765 (7th Cir. 1975).

REASONS FOR GRANTING THE WRIT

I. THE MISSOURI COURT OF APPEALS' AWARD OF $26,500,000 IN PUNITIVE DAMAGES VIOLATES DUE PROCESS BECAUSE (a) PETITIONERS HAD NO NOTICE THAT MISSOURI WOULD EXACT SUCH A SEVERE PENALTY FOR THE FIRST INCIDENT OCCURRING IN THAT STATE, (b) THE CONDUCT PUNISHED OCCURRED ALMOST ENTIRELY IN OTHER STATES OR COUNTRIES, (c) THE PUNITIVE ASSESSMENT CONSTITUTES MORE THAN 21% OF TSA'S NET WORTH AND IS MORE THAN SEVEN TIMES TEC'S NET WORTH, AND (d) THE SAME COURT AT THE SAME TIME IMPOSED AN ADDITIONAL $26,500,000 IN PUNITIVE DAMAGES AGAINST PETITIONERS IN A COMPANION CASE FOR THE SAME CONDUCT.

This case presents important and recurring questions concerning the outer constitutional boundaries of punitive damages that were left open in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). The Missouri Court of Appeals imposed a $26,500,000 penalty on petitioners by way of remittitur under circumstances that should raise even the most inflexible of eyebrows. There are at least four due process problems with the punitive award that deserve this Court's attention.

A. Lack of Notice.

The entire statutory basis for the imposition of damages for "aggravating circumstances" in Missouri is contained in the ultimate sentence of Mo. Rev. Stat. §537.090 (1994): "The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts. . . ." Note that the word "damages" does not even appear in the text; yet this obscure and seemingly innocuous reference is the sole basis for the penalty imposed by the appellate court, which it fully equated

to punitive damages in accordance with the Supreme Court's holding in *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464, 467 (Mo. banc 1995). *See* Apdx. p. A-32 n.8.

At the time of the 1993 accident that gave rise to this case, "aggravating circumstances" had never played more than a *de minimis* role in Missouri Wrongful Death litigation. Indeed, the largest *total* award for any single wrongful death was $2,000,000 in *Goff v. St. Luke's Hospital of Kansas City*, 753 S.W.2d 557 (Mo. banc 1988), where the amount of damages was not contested on appeal. The largest judgment ever to survive an excessiveness challenge was $1,500,000, which was upheld in three different cases, *Blum v. Airport Terminal Services, Inc.*, 762 S.W.2d 67 (Mo. App. 1988); *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. App. 1986); and *Schiles v. Schaefer*, 710 S.W.2d 254 (Mo. App. 1986).[7]

In *BMW*, 116 S. Ct. at 1604, this Court observed that due process entitles a defendant "to fair notice of the demands that the several states imposed on the conduct of its business." The French manufacturer TSA, in particular, had no business contacts with Missouri and may not even have been aware that any of its engines had found their way into Missouri. But even if it had diligently examined Missouri statutory and case law to assess the risks of doing business in that State, it would have had no conceivable reason to think that an obscure reference to "aggravating circumstances" that "may be considered by the

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[7] In the 1996 case of *Call v. Heard*, 925 S.W.2d 840 (Mo. banc 1996), the Supreme Court affirmed a punitive wrongful death award of $5,000,000 against an underage drunken driver who drank six packs of beer, crossed the center line in his pickup truck, and killed three persons. The defendant, who was convicted of three counts of manslaughter and sentenced to seven years in prison, did not argue excessiveness on appeal. Nevertheless, one of the dissenting judges said that the "size of the award shocks my conscience to such an extent that I deem it plain error . . . ." *Id.* at 855 (Blackmar, Sr. J., dissenting).

trier of the facts" could subject it to massive punitive damages. Nor would it have had any advance warning that if its first incident of product failure in Missouri produced a fatality, the penalty would be financially ruinous.

Under any rational formulation of "fair notice," this judgment is constitutionally infirm. The Court should grant review to afford guidance to the states about the warning required before a substantial confiscation of a nonresident's assets occurs.

B. Extraterritorial Punishment.

A major theme of respondents' case was that the TU-76 nozzle guide vane had experienced a number of problems beginning in 1986, resulting in some in-flight engine stoppages in various parts of the world, including the Congo, France, Bolivia, Arizona, California, Portugal, Guyana, and Brazil. *See* Apdx. pp. A-7 to A-13. There was no evidence that any other helicopter had suffered any damage in Missouri or that any person had been injured previously in Missouri as a result of an allegedly defective TU-76. *In fact, there was no evidence that any other helicopter had ever flown in Missouri with a TU-76.*

Nevertheless, even though the prior problems with the TU-76 had never caused a fatality and even though only five people had ever been injured in millions of hours of operations, respondents argued that petitioners should have recalled all engines around the world and that damages should be measured by the cost savings realized by not issuing such a recall. Respondents pegged this number at $48,000,000 by multiplying the supposed cost of a retrofit by the number of engines sold throughout the world. It was at least in part on this dubious and mathematically flawed exercise that the jury relied in fixing punitive damages at $175,000,000.

The Court of Appeals, in seemingly plucking $26,500,000 out of thin air as the remitted penalty amount, was obviously influenced by the jury's mammoth verdict and likewise made reference to the prior problems experienced worldwide and the fact that the engines were not recalled. Apdx. pp. A-39 to A-45. The court thus annointed Missouri the world's policeman and permitted it to extract recompense measured by all of petitioners' perceived worldwide transgressions. That was beyond its constitutional power.

In *BMW*, the forum state (Alabama) sought to impose punishment based on BMW's overall conduct, rather than limiting it to behavior that offended the laws or policies of Alabama or violated the rights of citizens of that State. The Court held that Alabama had no constitutional interest in punishing activity outside its borders — particularly activity that was legal where performed — saying that "the award must be analyzed in light of the [in-state] conduct, with consideration given only to the interests of Alabama consumers, rather than those of the entire nation." *BMW*, 116 S. Ct. at 1598. Thus, "it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanctions . . . ." *Id.* at 1598 n.21.

Moreover, respondents blatantly appealed to the jurors' xenophobic prejudices by arguing that petitioners discriminated against Americans and favored their French customers — particularly the French military — by giving them accurate information and free retrofits (Tr. 2703). Although those assertions were not supported by the record, respondents included these French transactions in compiling their inflated per-engine damage model. This, too, was foreclosed by *BMW*:

> "We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other States." *Id.* at 1597.

Because this unprecedented punitive award for a single death bears no relation to petitioners' Missouri-based conduct, the Court should clarify and further delineate the sovereign interests of the several states that can constitutionally be vindicated by punitive damages.

C. Penalty as a Percentage of Net Worth.

The remitted punitive damage award imposed by the Court of Appeals, representing almost 22% of TSA's net worth, and 750% of TEC's, constitutes a confiscatory, arbitrary appropriation of petitioners' property. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (factors to be considered in determining excessiveness include ". . . (d) the 'financial position' of the defendant"); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 (8th Cir. 1995) (White, J., sitting by designation) ("wealth of defendant" is factor to be considered in determining reasonableness of punitive award under Due Process Clause). Although punitive-type damages are intended to sting, not destroy, *Dunn v. Hovic*, 1 F.3d 1371, 1404 (3d Cir. 1993) (Weis, J., dissenting), there can be little question that the jury intended to destroy these petitioners, as plaintiffs' counsel baldly encouraged them to do. It would seem too obvious for argument that seizing almost 22% of a defendant's net worth offends the Constitution, and an analysis of other cases confirms that conclusion.

The Eighth Circuit recently held that a punitive assessment of five percent of the defendant's net worth is *per se* excessive. *Equal Employment Opportunity Comm'n v. HBE Corp.*, 135 F.3d 543, 557 (8th Cir. 1998). In *Cash v. Beltmann North American Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990), the court observed that a typical ratio for a punitive damage award to a defendant's net worth is about one percent. *See also Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (original $50 million punitive verdict reduced to $350,000, or 0.002% of defendant's net worth); *Ross v. Black & Decker*, 977 F.2d 1178

(7th Cir. 1992) ($10 million punitive judgment reduced to $5 million, or .25% of defendant's net worth), *cert. denied*, 507 U.S. 917 (1993); *Lipari v. Volume Shoe Corp.*, 664 S.W.2d 953 (Mo. App. 1983) (punitive damages award representing approximately .1% of defendant's net worth not excessive); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986) (two defendants; award represented 0.027% of their respective net worths), *cert. denied*, 478 U.S. 1022 (1986); *Spaeth v. Union Oil Co. of California*, 762 F.2d 865 (10th Cir. 1985) (0.06% of net worth), *cert. denied*, 476 U.S. 1104 (1986); *City of Greenville v. W.R. Grace & Co.*, 640 F. Supp. 559 (D.S.C. 1986) (0.07% of net worth), *aff'd*, 827 F.2d 975 (4th Cir. 1987); *Bemer Aviation, Inc. v. Hughes Helicopter, Inc.*, 621 F. Supp. 290 (E.D. Pa. 1985) (0.21% of net worth), *aff'd*, 802 F.2d 445 (3d Cir. 1986). Since TSA's net worth at the time of trial was $122 million, any punitive component of the overall award exceeding about $1,250,000 is constitutionally suspect.

This Court's discussion of the elements of due process in *BMW* did not refer to net worth ratios because the assessment there was a comparatively modest $2,000,000 and the defendant corporation was an international behemoth. Not so here. The numbers in this case leave no doubt that the jury intended to put petitioners out of business. The appellate court's remittitur eased the burden somewhat, but the resulting judgment still constitutes an unconscionable confiscation of petitioners' property. Some further guidance is needed from this Court on the permissible limits of the role of state tort law in regulating and destroying a business — especially a foreign business.

D. Cumulative Punishment in Contemporaneously-Decided *Letz* Case.

The excessiveness of the punitive imposition in this case is exacerbated — indeed doubled — by the fact that on the same day this case was decided the Court of Appeals in *Letz* imposed

another $26,500,000 in punitive damages on these same respondents for the very same conduct involving the very same accident. Even though §510.263.4 of the Missouri statutes specifically requires a credit for punitive damages previously paid for the same conduct, the Court of Appeals ruled that the statute does not literally apply when two cases dealing with a single accident are decided concurrently, and further refused to reduce either judgment as a matter of constitutional law, saying:

> ". . . the court feels the overall effect of both cases and the remitted amounts of punitive damages in *each* case, when combined, reach the proper result and supply the relief that the credit statute envisions and the United States Supreme Court has enunciated: that total punitive damages, where there are successive suits, will not go beyond due process limits in punishment and deterrence." Apdx. p. A-53 (emphasis in original).

The Court then summarily concluded that $53,000,000 in aggregate punitive damages did not offend due process.

The Missouri court's logic is hard to square with any other case ever reported. We have already shown how the award in this case standing alone tramples on petitioners' due process rights. But instead of appropriating nearly 22% of TSA's net worth, the aggregate penalty takes 43%. There is simply no rational justification for the contention that punishment of this magnitude is necessary to get petitioners' attention and modify their behavior — minimal as it is — in Missouri. *See Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996) ($30 million punitive award was "far more than is necessary to secure [defendant's] attention and modify its behavior in Oklahoma" and was reduced to $6 million in light of *BMW* as the "maximum constitutionally permissible punitive award" where actual economic loss did not exceed $1 million), *cert. denied*, 117 S.Ct. 1846 (1997).

One of the factors to be considered in the excessiveness analysis is "the existence of other civil awards against the defendant for the same conduct." *Haslip*, 499 U.S. at 22. If those words have any meaning, they certainly prohibit the double whammy levied by the Missouri court in these two cases where (a) the total economic loss incurred by the two sets of survivors was $1.5 million, (b) the accident produced the first fatality in the history of this product, and (c) the effect on Missouri citizens was limited to the families involved in this accident.

According to the lesson derived from the Missouri court's opinion, if this accident had involved a commercial airliner with 200 passengers aboard, each set of plaintiffs would be entitled to punitive damages — and presumably in the same amount — as would every other family. This method of regulating conduct by judicial fiat assumes that punitive damages are a matter of right and that if some are good, more are better. On the contrary, they are a windfall to an otherwise fully compensated plaintiff, and once the defendant has been punished for certain conduct, the courts should be concerned with assuring adequate compensation for other victims of that conduct, not with equalizing the windfall among the various plaintiffs. Indeed, the approach taken below could well exhaust a defendant's financial wherewithal before some victims receive *any* compensatory awards.

The multiple punishments administered here magnify the due process problems and afford the Court an important opportunity to explain when enough is enough.

II. THE PUNITIVE DAMAGE AWARD VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

Under §537.675.2 of the Missouri statutes, fifty percent of any final judgment for punitive damages is payable to the State of Missouri and deposited in the Tort Victims' Compensation Fund.[8/] This provision was upheld against numerous state-law challenges in *Fust v. Attorney General*, 947 S.W.2d 424 (Mo. banc 1997). This participation of the State in 50% of the punitive damages also renders the punitive award unconstitutional under the Eighth Amendment to the United States Constitution, which prohibits "excessive fines."[9/]

In *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989), the Court held that the Excessive Fines Clause does not apply to damages in a civil suit "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." The Court thus reserved the question whether the Clause would be implicated where the government does participate in the recovery. But as Justices Stevens and O'Connor observed in their partial dissent in *Browning-Ferris*, the majority opinion in that case "suggests . . . that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a govern-

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[8/] Missouri is one of at least eight states which has legislatively determined that a portion of punitive damages is payable to the State. *See*, Alaska Stat. §09.17.020(j) (50%); Ga. Code Ann. §51-12-5.1(e)(2) (75%); Ind. Code §34-4-34-6 (75%); Iowa Code §668A(2) (75% where wrongful conduct not aimed at claimant); Kan. Stat. Ann. §60-3402(e) (50% in medical malpractice cases); Or. Rev. Stat. §18.540(1) (60%); Utah Code Ann. §78-18-1(3) (50% of punitive damages in excess of $20,000).

[9/] Petitioners' excessive fines argument was noted by the Missouri Court of Appeals (Apdx. p. A-5) but was not separately addressed in the court's opinion.

mental entity." *Id.* at 298-99 (O'Connor, J., concurring in part and dissenting in part).

Since *Browning Ferris*, it has become more apparent that the State's participation in a punitive award triggers application of the Excessive Fines Clause. In *Austin v. United States*, 509 U.S. 602 (1993), the Court applied the Clause to civil forfeiture proceedings because, whether the forfeiture is labeled "civil" or "criminal," it constitutes punishment of a party, which is the concern animating the Eighth Amendment. *Id.* at 609. Punitive damages, including damages based on "aggravating circumstances," are designed to punish and deter. *Bennett*, 896 S.W.2d at 468. There is no principled basis to differentiate between the forfeiture involved in *Austin* and civil punitive damages paid directly to the State. Hence, according to the rationale of *Browning-Ferris* and *Austin*, the Excessive Fines Clause applies to punitive awards under §537.675.2.

There can be little doubt that the $26,500,000 punishment imposed in this case is monstrously excessive. After deduction of all counsel's expenses and attorneys' fees, the State of Missouri received a check for $4,742,199 (Apdx. p. A-64). By contrast, if petitioners were prosecuted in Missouri for involuntary manslaughter, the maximum fine would be $10,000 each. *See* Mo. Rev. Stat. §560.021 (1994). The total fine imposed by the appellate court is 1325 times that amount and was assessed for civil. not criminal, wrongdoing.

We are not sure where lies the line of demarcation between appropriate and excessive fines, but surely it has been crossed here. When considered in light of the *BMW* factors, defendants' net worth, previous punitive awards in Missouri and elsewhere, and the elements identified in Justice O'Connor's separate opinion in *Browning-Ferris*, 492 U.S. at 301, the award reeks of excessiveness. In addition, the cumulative effect of the remitted assessment in *Letz* renders the *Barnett* judgment all the more

arbitrary and irrational. *See Colonial Pipeline Co. v. Wright Contracting Co.*, 365 S.E.2d 827 (Ga. 1988) ($5 million punitive damage award violated Georgia constitutional prohibition against excessive fines), *appeal dismissed*, 488 U.S. 805 (1988).

The Court should grant review to address the Eighth Amendment implications of a State's participation in an exorbitant punitive damage award.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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June 22, 1998

APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD 51980

KYONG JU BARNETT, et al.,
Respondent-Appellant,
JAMES S. BARNETT, SR., and WANDA BARNETT,
Respondent-Appellants.

v.

LA SOCIETE ANONYME TURBOMECA FRANCE
A/K/A TURBOMECA, S.A.,
Appellant-Respondent,
TURBOMECA ENGINE CORPORATION,
Appellant-Respondent.

Appeal from the Circuit Court of Jackson County, Missouri
Honorable Lee E. Wells, Judge

OPINION FILED: NOVEMBER 25, 1997

Before: Ulrich, C.J., Lowenstein, Breckenridge, Hanna, Spinden, Smart, Ellis, Stith, Smith, Howard, JJ., and Berrey, Senior Judge.

This case, brought by survivors of the pilot in the same Life Flight helicopter accident which underlies the companion opinion handed down this day in *Letz v. Turbomeca Engine Corporation, et al.* W.D. #51446, was tried after the *Letz* case. The defendants have appealed on numerous grounds -- the plaintiffs cross-appeal on one point. The case was submitted to the jury on the theories of strict liability, negligence and failure to warn. *Letz* is being handed down simultaneously with this, the *Barnett* case, because the cases contain the same facts, similar and overlapping points and because the amount of punitive damages in the

previous case bears on the net amount of this award. This is an appeal by the same defendants in *Letz*, from the jury verdicts of $175 million actual damages and $175 million punitive damages which resulted in a trial court judgment, after remittitur, of $25 million actual and $87.5 million punitive arising from the wrongful death suit brought by the family of the pilot.[1] Therefore, this opinion will only briefly recite the relevant facts of the incident including factual and procedural details specific to this appeal. Additional facts will be included in the points to which they are relevant. This opinion will address only the points raised which are not resolved by this court's opinion in *Letz*.

GENERAL FACTS

On May 27, 1993, a single engine helicopter piloted by James Barnett, Life Flight 2, was transporting trauma victim, Sherry Ann Letz, from Maryville, Missouri to St. Luke's Hospital in Kansas City. En route, the helicopter engine suddenly failed and within ten to fifteen seconds crashed near Cameron. After the engine failed, Barnett maneuvered the aircraft some seventy feet beyond a stand of sixty foot trees, and crash-landed in a field. Four individuals were aboard the helicopter at the time of the crash: James Barnett, Jr., ("Barnett") the pilot; Sherry Letz, the trauma victim; Sheila Roth, a flight nurse; and Philip Hedrick, a respiratory therapist. Letz and Barnett were killed in the crash and the other two passengers were seriously injured. The crash was attributed to the failure of the TU-76 nozzle guide vane, in fact, Turbomeca finally admitted in their brief: ". . . there is no question in this case that the engine involved sustained an in-flight shutdown as a result of the failure of the TU-76 nozzle vane due to low stress thermal fatigue."[2]

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[1] There is a cross-appeal by the plaintiffs Barnett which relates to the amounts of the credit to be allowed on this judgment for the punitive damages assessed in *Letz*.

[2] For specific details explaining the TU-76 nozzle guide vane, the cause of the crash, and the reports generated by this accident, refer to *Letz v. Turbomecca Engine Corporation*, (slip opinion at pages 3-7).

The crash resulted in four separate lawsuits: the flight nurse and the respiratory therapist reached settlement agreements with Turbomeca, S.A., which designed and manufactured the helicopter, and Turbomeca Engine Corporation, a wholly owned subsidiary and distributor of the helicopter (hereinafter, the two defendant companies will be collectively referred to as "Turbomeca" and the American subsidiary, when standing alone, will be referred to as "Turbomeca Engine"). Letz's family filed a wrongful death action, and Barnett's family filed the wrongful death action here appealed. Again, in an effort to simplify the facts, Turbomeca shall mean *both* the defendant companies, and previous individual verdicts and judgments rendered against each of the two defendants shall be combined into one figure to represent the total judgment against "Turbomeca."

Barnett's immediate surviving family members who joined in the wrongful death action were: his wife of fifteen years, Kyong Ju ("Julia") Barnett; his fourteen-year-old son, Jessie; his twelve-year-old daughter Mia; and his parents, Wanda and James Barnett, Sr.

James Barnett died as a result of a transected thoracic aorta -- he bled to death in the helicopter within 3 to 5 minutes after the crash. On the date of his death, Barnett was forty years old and in generally good health. He was an experienced military and civilian pilot having completed Army flight school and helicopter training. He was also certified for commercial flights. Barnett was employed as a full-time Life Flight pilot for eight years prior to the accident and earned a salary of $34,000.00 annually. His life expectancy was an additional thirty-five years. Trial testimony indicated the purely economic damages suffered by Barnett's wife and children was $649,080.00. The amount of those damages is not contested.

Because this case was tried after *Letz,* the procedural aspects of the case are distinct. Specifically, the *Letz* trial was not bifurcated and the verdict on damages (originally $70 million)

was rendered in one lump sum which did not distinguish the amounts attributable to actual damages and punitive damages. This case was bifurcated as outlined in Section 510.263, RSMo 1994,[3] to distinguish the actual and punitive damages. A more detailed discussion of the statute is contained in Point 3, *infra.*

After a seventeen day jury trial, the jury returned a verdict of $175 million actual damages and $175 million punitive damages ($350 million total) in favor of Barnett's family. The verdicts were remitted by the trial court to $25 million actual damages and $87.5 million punitive damages ($112.5 million total). The trial court then issued a credit under Section 510.263.5 for the amount of punitive damages previously imposed by the trial court in *Letz*. Since the *Letz* verdict was not bifurcated, the court determined one-half of the $70 million total judgment was punitive and, accordingly, issued a $35 million credit. The Barnetts accepted the remitted award and the Second Amended and Final Judgment was entered awarding $25 million in actual damages and $52.5 million in punitive damages ($77.5 million total) allocated among the two named defendants.[4] Turbomeca appeals from this judgment and the Barnetts cross-appeal only on the matter of the credit based on the *Letz* punitive judgment.

Among the points raised in this appeal are several that are addressed and answered in this court's opinion in *Letz*[5]. Those points will not be directly dealt with in this opinion. The six points to be dealt with in this opinion are as follows:

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[3] All further statutory references are to the 1994 Revised Statutes of Missouri.

[4] The Appendix to this opinion presents a graphic summary of the dollar amounts awarded in the trial court and this court.

[5] Both, (1) the relevance of documents sent by Turbomeca to the FAA after the date of the accident, and (2) challenges to admission of deposition testimony of Dennis Nichols, president of Turbomeca Engine, regarding $48 million in cost savings for Turbomeca in not fixing the TU-76, were addressed in *Letz*.

1. Evidentiary questions involving: (A) pre-accident defects, and (B) whether Exhibit 111, an airworthiness directive, and Exhibit 177, an in-house letter on Turbomecca Engine letterhead suggesting the service bulletin was inadequate, should not have been admitted in evidence as they were evidence of post-accident subsequent remedial measures.

2. The trial court improperly instructed the jury in that: Instructions #25 and #27 did not instruct on proper mental state; Instruction #5 improperly defined "ordinary care"; and, Instruction #19 improperly withdrew an issue from the jury's consideration.

3. The trial court erred in refusing to allow the bifurcation process to be explained to the jury, and as a result, the jury was confused and misled.

4. The trial court erred in overruling defendants' objections to plaintiffs' admission of evidence of defendants' gross sales figures to support plaintiffs' claim for aggravating circumstances damages.

5. The trial court erred in denying defendants' motion for a new trial and refusing to enter a further remittitur of compensatory damages because the judgment as remitted, is grossly excessive, unsupported by the evidence, the product of counsel's misconduct and the jurors' bias, passion and prejudice, and bears no relation to damages authorized by Section 537.090.

6. The trial court erred in failing to grant a directed verdict (not preserved in *Letz)*, and denying defendants' motion for a new trial and refusing to further remit punitive damages because the judgment remains grossly excessive, the product of counsel's misconduct, constitutes an excessive fine under the Eighth

Amendment, denies defendants' due process and shocks the conscience of the court. Points 5 and 6 will be treated together as the final point on the Turbomeca appeal.

Finally, this opinion will address the Barnett cross-appeal on the proper net judgment amount for aggravating damages after calculation of the credit due from *Letz*.

SPECIFIC FACTS

The following is a timeline indicating the number and dates of all crash incidents involving the modified TU-76 and related Service Bulletins and Letters. It is presented to better acquaint the reader with the issues pertinent to this appeal.

Legend:

1. The chronology includes only incidents involving the *modified* TU-76 second stage nozzle -- the same defective product on the aircraft in this case. The original TU-76 was replaced by the modified TU-76 in the early 1980s, in order to gain a cost savings in production. The original component had not, prior to the modification, been implicated in any cracking problems or in-flight failures.[6] The later developed TU-202 ("Replacement") and TU-197 ("New") nozzles have not been implicated in any aircraft power failures.

2. Entries under "Information" are taken from internal Turbomeca reports or from testimony of its officials.

3. Entries involving this Life Flight helicopter are printed in bold.

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[6] This opinion will refer to the defective *modified* TU-76 as simply the TU-76, since the original TU-76 has never been implicated in any in-flight engine failures.

Year	Specific Date	Information
1985	June-July	Cracking problem discovered in TU-76 following accident, due to in-flight engine stoppage, in Congo. (1374 hours)(hereafter, where a number appears in parenthesis, that number indicates the number of flight hours between overhauls logged on that particular engine. **There were 2482 hours on the Life Flight helicopter in this case**). Turbomeca examines and determines the second stage problem came after cracking.
	September	Helicopter engine was returned by the owner to Turbomeca because of cracking found on the TU-76.
	October	Cracking incident involving TU-76 (940).
1986	January	1985 Congo accident involving a defective TU-76 reported to French DGAC and to French Military. DGAC is the French equivalent of the United States' F.A.A.. This information of a TU-76 problem was not given to the F.A.A., or other owners.
	January	Engine failure (1998)
		Engine failure (682)
	April	In-flight failure of engine (1148) in France, landed with some power. Turbomeca engineering report concludes a nozzle redesign is necessary and suggests overhaul of engine.
	June	Turbomeca conducts in-house testing of twelve second stage nozzles for cracking. The engineering report (Saviot) sent to the Executive Vice President, Chief of Engineering and ten others within Turbomeca, suggests the need to correct the cracking problem with TU-76, "caused by a low cycle fatigue stress of thermal

		origin. . . ." Preliminary conclusions point to poor design and poor manufacturing, and state that poor "machining process has been an aggravating factor." Research begins to correct problem.
	July	Follow-up to the June engineering report (Saviot) is sent to all high ranking Turbomeca officials, concluding modifications are needed to solve cracking problems which stemmed in part from "poor manufacturing quality of certain parts, and their improper stress level." Two 2nd stage nozzles were used in this test, one from a unit sold in January 1986 to Heli Union which had cracked after (682) hours and was described in the report as ". . . earliest cracked nozzle we have identified . . . " Turbomeca continues to manufacture engines with the modified TU-76 module.
	Year-end	In 1986 there were at least sixteen engines returned to Turbomeca because of cracking. Hours ranged from (682) to (2005).
1987		Testing for modifications to TU-76 continues.
	Year-end	In 1987 ten engines were returned to the manufacturer for cracking. Hours between overhaul were from (1156) to (2057).
1988		Testing for modifications continues, results yield "Replacement" (TU-202) (metal change) and "New" (TU-197) (change in shape).
	May	Turbomeca increases time between overhauls from 2000 to 2500 hours.
	Year-end	In 1988, fifteen engines were returned because of cracking, two were from the French police. Hours ranged from (455) to (2745).

1989 April — Turbomeca examines unit (865) from Germany which was returned because it suffered "seizing of axial compressor," with torn vanes and broken central hub on 2nd stage assembly. Conclusion: "We have registered up to now 3 cases of ruptures. . . ."

June — Engine (1015) failure, resulting in grave injuries to four individuals in Bolivia. Turbomeca exam by engineer Delbert finds rupture in 2nd stage turbine blades with deterioration of central hub and rupture of outer ring. Report sent to top executives.

June — **TU-76 installed in this helicopter during overhaul by Turbomeca Engine.**

October — Engineering Department of Turbomeca (Delbert) seeks approval of New (TU-197) part but a November notation states it is being "blocked by the Turbomeca's Commercial Department." After examining wreckage from the Bolivian crash, Delbert felt there was an urgent need to correct the TU-76.

November — Loss of power in a Phoenix TV station's helicopter caused an in-flight shutdown. The engine (1607) was examined and it was apparent the helicopter had a complete power failure over a busy freeway. Pilot successfully autorotated and landed in a field -- no injuries. Crack around 2nd stage of nozzle guide vane central box -- Turbomeca initially advises the owner that the warranty will not cover damage. Turbomeca relents and sends station another engine with the same TU-76 module.

December — Engine failure in flight - Hong Kong.

1990	January	Engineering memo to Commercial Department seeking "very urgent" approval of Replacement (TU-202) part.
	February	A helicopter engine (1639.7) suffers momentary deceleration in Oakland, as pilot hovered, prior to landing, after a round-trip flight. The pilot heard a loud, muffled explosion, power failure occurred, the aircraft yawed, pilot set up hovering autorotation, then engine power returned in 2-3 seconds, and the helicopter safely landed.
	May	Replacement and New parts completed and tested by Turbomeca.
	October	A confidential Turbomeca technical note (Delbert) on cracking nozzles listed three in-flight shutdowns (1015, 865, and 1602), and that twelve helicopters had been returned by owners because of cracking (all had between 500 and 2000 hours). At the time of the report, 427 engines had *not* been modified with the cheaper TU-76 -- of these engines with the *original* TU-76, none had been returned nor had been subject to an in-flight shut-down. 2105 of the modified variety existed, including those units that were sent back to Turbomeca or had shut-down in flight. This report was sent directly to the DGAC, but never supplied, even after the 1993 accident, to the FAA. This report stated the Replacement and New parts "... were developed to remedy this (cracking) problem."
	November	Turbomeca receives certification of New and Replacement parts from DGAC.
1991	January	Engine deceleration occurs in Oakland - no injuries sustained.

February — Replacement and New parts available to the 2,850 world-wide owners with TU-76, but no general recall is announced. Turbomeca never sent a notice to owners of aircraft with the modified TU-76 part that the New or Replacement components were available. French military were offered New and Replacement nozzles. Turbomeca makes a decision to replace TU-76 during the regular overhaul. (See May 1988).

March — First Service Letter sent to Owners who do not have Replacement, discusses checking for "abnormal noise during engine stop" to check. If owner hears a rubbing noise, it "may be due to a rubbing between the internal hub of the 2nd stage turbine nozzle guide vane and the rotating assembly." The owner was told if the rubbing noise has been loud, the part was to be removed. This was the first notice given to non-French owners of a TU-76 problem. It does not include in-flight failures of TU-76 to date, does not mention the cracking problem and does not mention that Replacement (TU-202) was to be installed at Turbomeca's cost.

June — In-flight shutdown in Portugal. Pilot and two passengers injured. (1354).

June — French military gives approval of New and Replacement parts.

1992 March — DGAC approval of Replacement part.

April — Service bulletin to American owners announcing availability of Replacement and New parts and recommending installation of either Replacement or New parts at time of regular overhaul. The degree of urgency of the Bulletin was listed as "optional." Levels go from most im-

portant, "urgent," down to "mandatory," "recommended," and finally, "optional."

November — In-flight shutdown during take-off in Australia. Engine (1455) examined by Turbomeca - indicates the cracks are due to friction and disconnection of TU-76 second stage nozzle guide vane.

December — Second Service Letter, to Owners who do not have New or Replacement parts, similar to March 1991 Letter (listen for noises).

1993 January — "Guyana" incident -- an in-flight engine shutdown (1401), after explosive noise. DGAC approval of New part.

February — Second service bulletin, similar to April 1992. The degree of urgency was "recommended." It stated the change to the Replacement part would take one mechanic two hours to install.

February 15 — Turbomeca inspects aircraft (1966) with 2nd stage nozzle guide vane damage, after in-flight failure preceded by several loud bangs and rapid loss of power (49%). Occurrence takes place on return portion of a round trip in Virginia. No injuries.

February 15 — Customer in Brazil sends helicopter engine (1669) to Turbomeca after in-flight stoppage.

April 13 — Third Service Letter. Turbomeca sends "Alert Information" service letter to Owners, "following an engine in-flight shut-down which occurred recently," warning to be aware of rubbing sounds. The word "mandatory" is used for all Owners who do not have the New or Replacement part. This is first reference in any correspondence by Turbomeca to an in-flight shut down.

May 22 — Turbomeca Engine finds 2nd stage problem (2011.5) after a pilot in Houston, Texas heard loud bang, no power loss occurred but while landing, the pilot heard a rubbing noise on coastdown.

May 26 — Phoenix TV station (see November 1989) helicopter engine (1894.9 hours on the replacement engine equipped with the TU-76) explodes five minutes after takeoff, yaws to right, pilot makes emergency landing with three passengers after a loss of power. Turbomeca Engine attempts to settle, but in letter sent to Turbomeca, says "I have tried to negotiate with this customer based on repairing his damaged engine which prices out at $178,000 for overhauls which I pro-rated to $134,000 based on the time of 1800 hours on the engine. He stated to me he did not want this engine back and wanted an offer on a new engine. I then offerred (sic) him a new 1B engine for $165,000 plus his old engine. He was insulted. He expects that based on his history of two engine problems for the same reason, we should be willing to show better faith and expects a new engine for free."

May 27 — **The Life Flight accident followed a "big, loud pop," then a clattering sound, then a horn indicating an engine failure which would not sustain the helicopter staying airborne.** Also on this date, a Turbomecca technical note distributed in-house concerned cracking on the TU-76 nozzle listed six previous in-flight shutdowns as of December 1992. An increase in "crack rate" over 1990 study. No cracks or shutdowns attributable to the Replacement or New parts.

May 27 — Turbomeca Technical Report (Delbert) saying, the crack occurrence may happen at any time

along the TU-76 nozzle's lifetime, and may well never happen. 75 of 98 nozzles with cracks examined by Turbo have 2000 hours, or less.

June — **Turbomeca letter to FAA stating this accident was the seventh incident/accident relating to the TU-76 nozzle. Reported numerous incidents of cracks found during repairs and overhauls, due to a design and manufacture defect that caused rubbing and stress. Appended Service Bulletins which disclosed to Owners that a visual inspection will not disclose cracks but deterioration may be indicated by listening for the rubbing noise while helicopter is on ground.**

June — **FAA report on this accident. (2482) hours on engine. Barnett had 4,970 flight hours of which 1,400 were from military. He had averaged 100 to 120 Life Flights a year for preceding 3 years. Pilot had not been trained in autorotation without power. Nurse on board was interviewed: Her statement indicated that 10-15 seconds from loud pop, then clattering noise, white light went on left side cockpit, pilot maneuvered "cyclic and collective," and pulled the nose up, then rear of copter struck earth. A witness reported seeing the helicopter just before the accident at 400-500 foot altitude.** Report also states "the crack may develop to a complete opening (failure), even if rubbing not detectable.

July — Turbomeca reports to DGAC. In July and August the DGAC issues Airworthiness Directive stating "Deteriorations . . . have resulted . . . in engine shutdowns." It makes mandatory the check of the module for rubbing noises.

December	Portugal, power loss, emergency landing during take-off.1994
February	Accident, following in-flight shutdown, Australia. Turbomeca tells FAA this was accident number 8 involving TU-76.
July	In-flight failure in Italy.

Other specific facts will be presented in the relevant Point Relied On. Again, the issues now presented are those not raised nor decided upon in *Letz*.

1. EVIDENTIARY QUESTIONS INVOLVING: A) PRE-ACCIDENT DEFECTS AND B) POST-ACCIDENT REMEDIAL MEASURES.

A.

Turbomeca now asserts that many of the memos and reports shown in the chronology of the facts should have been excluded on relevancy grounds. This case was submitted, in part, for recovery of actual damages in a product liability case, where the plaintiffs were required to show the product was defective and dangerous when put to a use reasonably anticipated by the manufacturer, and plaintiffs sustained damage as a direct result of the defect. For punitive damages, there had to be a showing that the defendant had actual knowledge of the defect and danger at the time the product was sold. *Angotti v. Celetox Corp.*, 812 S.W.2d 742, 751 - 52 (Mo. App. 1991). Turbomeca internal reports and the evidence of other crash information relating to this defective part went to show the danger of the product and to establish the defendant had actual knowledge of the danger. *Angotti*, 812 S.W.2d at 751 - 52.

B.

This point is a variation on Point V in *Letz*, the reasoning there is applicable here, so it will not be repeated. There is an additional reason for denial.

Exhibit 111 was an Airworthiness Directive issued in the summer of 1993 (see timeline) by the French DGAC and referred to the potential "worsening of this defect," and resulted in a more profound warning to owners of a defect that might cause in-flight shutdowns. Exhibit 177 was an internal Turbomeca memo in December 1993 in which the previous procedure to detect, listening for rubbing noises, was deemed not sufficient. Turbomeca correctly points out that evidence of subsequent remedial measures is inadmissible in negligence actions. *Pollard v. Ashby*, 793 S.W.2d 394, 401 (Mo. App. 1990). Turbomeca grudgingly admits, in a footnote at the end of it's Point Relied On, the existence of this court's opinion in *Stinson v. E.I. DuPont de Nemours and Company*, 904 S.W.2d 428 (Mo.App. 1995). In *Stinson*, under a strict product liability theory the plaintiff sought to introduce evidence showing the pre-injury warning label on the defendant's product said the product "could cause an allergic respiratory reaction," while the post-accident label "warned of the possibility of permanent lung injury." *Stinson*, 904 S.W.2d at 432. At page 432 this court said the post-accident rule in negligence cases did not apply ". . . in strict liability cases because: (1) the culpability of the defendant is irrelevant in such actions; and (2) the purposes of the rule would not be served."

In this case, where negligence and strict liability were both submitted, the post-accident evidence was relevant for one count, and, as long as it was not unduly prejudicial to Turbomeca, being relevant for one purpose but not another, the evidence was admissible. *Rodriguez v. Suzuki Motor Corporation*, 936 S.W.2d 104, 109 (Mo. banc 1996); *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 15 (Mo. banc 1994). If a defendant wishes to emphasize the limited purpose of the evidence, a limiting instruction may be requested. *Id.* A broad or blanket objection will not suffice when an exhibit is admissible for one purpose and not another. *Crockett by Crockett v. Schlingman*, 741 S.W.2d 717, 718 (Mo. App. 1987).

The point is denied.

2. INSTRUCTIONAL ERRORS: A) IN PROPERLY DEFINING DEFENDANT'S MENTAL STATE, B) IMPROPERLY DEFINING THE TERM ORDINARY CARE, AND C) WITHDRAWING AN ISSUE FROM THE JURY

A) Turbomeca asserts the exemplary damage instructions given by the trial court were improper as they did not adequately define, nor require a jury to find that "the defendant knew or should have known its conduct created a high probability of injury." The trial court utilized MAI 10.06 which is to be used in cases where exemplary damages are sought where both negligence and strict liability are submitted. MAI 10.06 states that if the jury finds that the acts set out in the plaintiff's negligence and strict liability verdict directors, "showed a complete indifference to or conscious disregard for the safety of others," then the jury could award punitive damages. Turbomeca here contends MAI instructions 10.02 (negligence) and 10.04 (strict liability) should have instead been given. There are several problems with this point. First, both MAI 10.02 and 10.04 contain the language "showed a complete disregard for the safety of others." While this is not exactly the same as the damage instruction given to the jury, the damage instruction given was so sufficiently similar to imply the same direction to the jury that any prejudice would be utterly minimal. Second, Turbomeca's point on appeal regarding the lack of definition as to scienter or conduct was not properly preserved. The objections at the instruction conference make no mention of this objection now raised on appeal. Turbomeca, in its reply brief, candidly admits any review would be under plain error. The admonition in *Fowler v. Park*, 673 S.W.2d 749, 757 (Mo. banc 1984) as to making the proper objection at the instruction conference, and the reluctance of appellate courts to reverse for errors in instruction without a substantial indication of prejudice, apply here. In addition, Rule 70.03 is clear --"No party may assign as error the giving or failure

to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for the objection." Therefore, the court will not grant plain error relief.

B) The next assignment of instructional error concerns the definition of ordinary care. Turbomeca argued for MAI 11.05 which defines the degree of care required of a defendant as what "an ordinarily careful person would use . . . ." The court gave 11.10 II which ". . . means the degree of care, skill and learning that an ordinarily careful expert in defendant's business would use under the same or similar circumstances." Turbomeca states that all cases cited in the Committee Comment for use of this instruction for "Manufacturers of Certain Products," involve defendants who manufactured drugs. The argument is not persuasive. There was extended evidence offered from both sides as to the sophisticated nature of the engineering, dynamics, and production of helicopter engines. The trial court was justified in giving 11.10 II under these facts. Further, Turbomeca puts forth no showing of prejudice. This argument is denied.

C) Finally, Turbomeca disputes the trial court, pursuant to MAI 34.01, for giving a withdrawal instruction on evidence presented by Turbomeca that Rocky Mountain Helicopters had not performed so-called power checks or engine condition checks every 25 flying hours on the Life Flight's engine. These checks appear to be in the order of regularly scheduled maintenance on all aircraft as compared to the checks for rubbing noises as described in the service letters and bulletins. The trial court determined from the evidence that the performing of these particular checks would not have divulged anything relevant to the owner of impending power failure based on the *admitted* cause of this accident -- the defective TU-76. The purpose and use of withdrawal instructions is to avoid misleading a jury on a specious issue and the giving or refusing of these instructions is up to the discretion of the judge. *Bradley v. Browning-Ferris*

Industries, 779 S.W.2d 760, 765 (Mo. App. 1989). An abuse of the trial court's discretion is reviewed to determine whether the ruling is clearly against the logic of the circumstances and so arbitrary and unreasonable to shock a sense of justice, thus indicating a lack of careful consideration. *Shady Valley Park & Pool v. Weber, Inc.* 913 S.W.2d 28, 37 (Mo. App. 1995).

This point is denied.

3. TRIAL COURT FAILED TO ALLOW TURBOMECA IN ARGUMENT AND THROUGH INSTRUCTIONS TO ADEQUATELY EXPLAIN TO JURY THE TRIAL WOULD BE BIFURCATED.

Under the auspices of Section 510.263, Turbomeca invoked the option for a bifurcated trial.

> 1. All actions tried before a jury involving punitive damages shall be conducted in a bifurcated trial before the same jury if requested by any party.
>
> 2. In the first stage of a bifurcated trial, in which the issue of punitive damages is submissible, the jury shall determine liability for compensatory damages, the amount of compensatory damages, including nominal damages, and the liability of a defendant for punitive damages. Evidence of defendant's financial condition shall not be admissible in the first stage of such trial unless admissible for a proper purpose other than the amount of punitive damages.
>
> 3. If during the first stage of a bifurcated trial the jury determines that a defendant is liable for punitive damages, that jury shall determine, in a second stage of trial, the amount of punitive damages to be awarded against such defendant. Evidence of such defendant's net worth shall be admissible during the second stage of such trial.

When this statutory scheme is utilized in a suit involving punitive damages, the first phase of the trial calls for the jury to

first determine liability and the amount of compensatory damages, then liability for punitive damages. The second phase, if necessary, allows the jury to determine the amount of punitive damages.

Turbomeca does not claim instructional error such as a failure to use mandatory jury instructions or an improper amendment of jury instructions. Turbomeca here levels two complaints at the trial court for failure to heed the *suggestions* under MAI 35.19. MAI 35.19 contains a sample package of instructions for a trial involving punitive damages, and is contained in the "Illustrations" portion of MAI.

First, Turbomeca points to the following language in the Committee Comment to MAI 35.19: "The trial judge should exercise sound discretion in affording attorneys appropriate leeway during the various stages of trial to describe to the jury the proceedings contemplated by Section 510.263." Turbomeca's claim is that the quoted language is mandatory and should have been the authority to require the court to allow it to explain during voir dire, and in opening statement and closing argument that there would be a phase two and to emphasize the jury was not to award punitive style damages in phase one. The trial court did not allow Turbomeca to pursue this course.

Second, Turbomeca states the judge failed to include the proper and "mandatory" language contained in MAI 35.19: "If you find that defendant is liable for punitive damages in this stage of the trial, you will be given further instructions for assessing the amount of punitive damages in the second stage of the trial."

Turbomeca argues that both these errors constitute an abuse of discretion. The prejudice it claims is the $175 million verdict for compensatory damages. Turbomeca stresses that the jury failed to understand that the punitive damage portion of the trial was separate, and that it covered different damages. Appellate courts

hesitate to overturn an order of a trial court on matters resting within the discretion of trial court. *Forester v. Roddy*, 418 S.W.2d 67 (Mo. 1967). The decision to inform the jury of the technical workings of a bifurcated trial was an exercise of judicial discretion and will not be disturbed on appeal in absence of evidence of abuse thereof. *Arno v. St. Louis Public Service Co.*, 202 S.W.2d 787, (Mo.banc 1947).

The court can hardly be faulted for having given MAI instructions. It can not amount to reversible error in this case to fail to heed language in an illustrative instruction. *Northeast Missouri Electric Power Cooperative, v. Fulkerson*, 542 S.W.2d 26, 31 - 32 (Mo. App. 1976). Committee Comments are advisory not mandatory, and prejudice does not follow from a neglect to use them. *Sall v. Ellfeldt*, 662 S.W.2d 517, 524 (Mo. App. 1983). Although the court does not recognize reversible error here, certainly the better practice would be to more fully instruct the jury as to the bifurcated proceedings. Even if the jury was misled by the two-phase aspect of the trial, any prejudice is corrected by this court's action taken in point 5 on remittitur.

Turbomeca's claim that the compensatory damages were polluted with punitive damage evidence, is, however, worthy of further mention. Without unduly extending this opinion, a question may remain for legislative consideration. How much should the jury know, and at what stage in the trial should the defendant's conduct and the defendant's wealth be presented? Missouri's bifurcation process where punitive or aggravating damages are sought, is employed, with variations, in California, Georgia, Kansas, Montana, Nevada, New York, Tennessee, Utah and Wyoming.

What our system does is initially shield the evidence of the defendant's wealth from the jury, until there has been a determination that the defendant's conduct merits punitive damages. One commentator has mused, "It is a good guess that rich men do not fare well before juries, and the more emphasis placed on

their riches, the less well they fare." Morris, Punitive Damages in Tort Cases, 44 Harvard Law Review. 1173, 1191 (1931). Though evidence of wealth is delayed, our system allows the jury, in the first phase, to hear evidence on both the issues of liability and punitive damages. *Angotti v. Celotex Corp.*, 812 S.W.2d at 757. As earlier noted, it is only after hearing this evidence that the jury decides liability for compensatory damages, and renders a verdict as to whether to proceed to phase two to determine the amount of punitive damages. Combining a jury's determination of actual damages with liability for punitive damages, after hearing all the evidence on the elements of defendant's conduct, could lead to an inflated amount of compensatory damages. Some states, including Minnesota and North Dakota, have attempted to handle this situation by allowing only purely compensatory evidence at the first stage, then combining punitive damage type evidence and net worth in the second stage. This method does allow the jury to hear the wealth of the defendant along with examples of its conduct. Another alternative, which New Jersey used for a time, calls for a trifurcated proceeding, where compensatory damages are dealt with in the first phase, punitive type conduct is presented in the second phase to determine liability for punitive damages, and, then in the third stage, the defendant's net worth is presented and the amount of punitive damages is determined. Needless to say, the other methods are not without pitfalls and problems such as unduly prolonging a trial.

4. NET WORTH EVIDENCE

Turbomeca's next point asserts trial court error in the admission of evidence of its net worth in the second portion of the bifurcated trial where the jury was to consider the amount of punitive damages. Specifically, Turbomeca says Missouri law permits only evidence of the defendant's net worth, and allowing evidence before the jury of gross yearly sales is unrelated to "punitive-type damages."

Section 510.263, which deals with the procedure of a bifurcated trial where punitive damages are sought, first states in subsection two, "[E]vidence of defendant's *financial condition* shall not be admissible in the first stage. . . .," and then in subsection three, "If during the first stage of a bifurcated trial the jury determines that a defendant is liable for punitive damages, that jury shall determine, in a second stage of trial, the amount of punitive damages to be awarded against such defendant. Evidence of such defendant's *net worth* shall be admissible during the second stage of such trial." (Emphasis added). Turbomeca insists the reference to net worth evokes a legislative intent to limit evidence solely to a net worth figure, and use of any other financial evidence during this stage, is prejudicial error requiring reversal. The trial court allowed the Barnett plaintiffs to introduce two prior years' sales figures of the Turbomeca.

During discovery, Turbomeca submitted a financial report prepared for it showing a 1993 net worth of 591,255,863 francs which translated into $122,565,470. There was additional evidence of $200,369,360 as the net worth figure (assets minus liabilities) which was given to the jury and, over objection the reports 1992 and 1993 sales figures of $498,373,130 and $474,967,030 were allowed in evidence. Admission of the sales figures is at the heart of this point on appeal.

To support this point, Turbomeca relies primarily on *Gollwitzer v. Theodoro*, 675 S.W.2d 109, 111-112 (Mo. App. 1984). In *Gollwitzer* the Eastern District noted the *only* evidence offered by the plaintiff as to determining the proper measures of "affluence and wealth" of the defendant, consisted of gross sales and inventory taken from the defendant's prior tax returns. The opinion noted that admission of gross sales figures does not demonstrate that a profit was had, "and standing alone means nothing." *Id.* Similarly, the court noted inventory figures mean nothing without knowing whether goods on hand were mortgaged, or even if a large inventory equated to a lack of business.

Turbomeca's point that the only evidence relevant here is the net worth figure, is not well taken. This language from this court's decision in *Green v. Miller,* 851 S.W.2d 553, 555 (Mo. App. 1993) shows the law allows additional evidence other than the assets minus liabilities figure: "When determining the amount of punitive damages to be awarded, the worth or financial condition of the tortfeasor is a relevant consideration." *See also Call v. Heard,* 925 S.W.2d 840, 849 (Mo. banc 1996), where the Court referred to the "financial status," of the defendant as being relevant in determination of punitive damages); *Moore v. Missouri-Nebraska Express, Inc.* 892 S.W.2d 696, 674 (Mo. App. 1994). The law does not make irrelevant and inadmissible any evidence of the defendant's "financial status" other than the net worth figure. Under the proscription of Gollwitzer, there was sufficient evidence, including net worth, to support a jury determination of the extent of punitive damages necessary to punish and deter this defendant. The evidence here of sales was admissible, its weight was to be determined by the jury. The point is denied.

5. SUBMISSIBILITY AND AMOUNT OF COMPENSATORY AND PUNITIVE DAMAGES

The court now recites the standards for remittitur and determining excessiveness of damages under Section 537.090, Missouri's wrongful death act. This section shall apply to Turbomeca's request for new trial and further remittitur of the compensatory and punitive awards. In Missouri, there are generally two situations in which an appeal of an excessive verdict arises: (1) where the verdict is simply disproportionate to the proof of injury and results from an honest mistake by the jury in assessment of the evidence and, (2) where the verdict's excessiveness is engendered by trial misconduct and thus results from the bias and prejudice of the jury. A verdict in the first instance may be corrected by an enforced remittitur and does not require a retrial. A verdict of the second variety is prejudiced and can

only be remedied with a new trial. *Young v. Jack Boring's, Inc.*, 540 S.W.2d 887, 897 (Mo.App. 1976) (citation omitted); *Coulter v. Michigan Tire Corp.*, 622 S.W.2d 421, 436 (Mo. App. 1981), *cert. denied*, 456 U.S. 906 (1982).

Turbomeca argues that both the compensatory damages award and the punitive damages award were the product of trial misconduct and, thus, justify ordering a new trial. The points raised by Turbomeca to support its claims of misconduct are as follows: (1) plaintiffs improperly referred to cost-savings figure and the FAA reports; (2) plaintiffs employed improper videotaping techniques in depositions; (3) counsel's closing argument for plaintiffs was inflammatory and overly emotional; and (4) plaintiffs' counsel indicated to the jury that Turbomeca executives' deposition testimony was inferior to a personal appearance in court. Turbomeca's first claim of misconduct -- the referral to the cost-savings figure and the FAA reports -- was resolved in Letz, where this court held such evidence was relevant and admissible to show aggravating circumstances. The second, third, and fourth points raised, even assuming they amount to error or misconduct, are not, on appeal, so significant as to require a new trial.

Whether trial misconduct exists such that it engendered passion and prejudice on the part of the jury is left largely to the discretion of the trial court. *Walton v. U.S. Steel Corp.*, 362 S.W.2d 617, 627 (Mo. 1962); *Skadal v. Brown*, 351 S.W.2d 684, 690-91 (Mo. 1961). The trial court had every opportunity to see and observe the conduct of plaintiffs' counsel, and was aware of the circumstances surrounding counsels' actions as well as the general atmosphere of the trial. Based on its observations, the trial court ordered a remittitur of the verdicts, effectively ruling that any alleged trial misconduct did not warrant a new trial. This court sees nothing in this record to indicate that the trial court abused its discretion in failing to grant defendants a new trial because of the aforementioned incidents, whether such are

considered separately or cumulatively. Accordingly, with no trial misconduct by plaintiffs' counsel warranting a new trial, remittitur is an appropriate remedy.

The doctrine of remittitur has long been grounded in our common law. Although the Supreme Court of Missouri abrogated the doctrine in *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. banc 1985), Missouri's legislature reinstated remittitur soon thereafter. The remittitur statute, Section 537.068, was designed to establish equitable compensation and to eliminate, to the extent possible, the retrial of lawsuits. *Bishop v. Cummines*, 870 S.W.2d 922, 924 (Mo. App. 1994). Under Section 536.068, remittitur is proper only where, "after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict . . . exceeds fair and reasonable compensation for plaintiff's injuries and damages. . . ."

The trial court has broad discretion in ordering remittitur because the ruling is based upon the weight of the evidence, and the trial court is in the best position to weigh the evidence. *Magnuson by Mabe v. Kelsey-Hayes Co.*, 844 S.W.2d 448, 457 (Mo. App. 1992); *Fust v. Francois*, 913 S.W.2d 38, 49 (Mo. App. 1995). This court will interfere with an order of remittitur only upon a finding that both the jury's verdict and the trial court's ruling constituted an arbitrary abuse of discretion. *Hall v. Superior Chemical & Fertilizer, Inc.*, 819 S.W.2d 422, 425 (Mo. App. 1991); *See also Bishop v. Cummines*, 870 S.W.2d at 923. The trial court will be deemed to have abused its discretion where the remitted judgment is still so excessive as to shock the conscience of the appellate court. *Larabee v. Washington*, 793 S.W.2d 357, 360 (Mo. App. 1990); *See also Fust v. Francois*, 913 S.W.2d at 49 (Mo. App. 1995).

Missouri courts have consistently adhered to the rule that a verdict of a jury in assessing damages will not be disturbed unless it is grossly excessive or inadequate. *Sandifer v. Thompson*, 280 S.W.2d 412, 415 (Mo. 1955). In determining whether

a verdict is grossly excessive, the appellate court reviews the evidence in the light most favorable to the plaintiff. *Sandifer v. Thompson*, 280 S.W.2d 412, 416 (Mo. 1955). *See also Triplett v. Beeler*, 268 S.W.2d 814, 819 (Mo. 1954). The ultimate test is what fairly and reasonably compensates the plaintiff for the injuries sustained. *Coulter v. Michelin Tire Corp.*, 622 S.W.2d 421, 436 (Mo. App. 1981), *cert. denied*, 456 U.S. 906 (1982); *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1299 (8th Circ. 1987).

A. COMPENSATORY DAMAGES

The jury awarded plaintiffs $175 million in compensatory damages, which the trial court remitted to $25 million. Turbomeca appeals the remitted compensatory award claiming that the trial court erred in denying defendant's motion for a new trial and refusing to further remit the compensatory verdict. Turbomeca claims that the verdict, even as remitted is: (1) grossly excessive, (2) the product of misconduct by plaintiffs' counsel thus demonstrating bias, passion and prejudice of the jury; (3) shocks the conscience of the court, (4) exceeds fair and reasonable compensation, and (5) is unsupported by the evidence.

Turbomeca first requests that this court order a new trial arguing that such relief is warranted by the excessiveness of the verdict. Entitlement to a new trial based on the excessiveness of the verdict requires a showing of trial court error. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 872 (Mo. banc. 1993); *Larabee*, 793 S.W.2d at 359. The size of the verdict alone will not establish bias, passion, and prejudice of the jury. *Id.* The complaining party must show that the verdict, viewed in the light most favorable to the prevailing party, was glaringly unwarranted and that some trial error or misconduct of the prevailing party was responsible for prejudicing the jury.[7] *Id.*

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[7] See discussion *supra* for analysis of Turbomeca's claim of trial misconduct by plaintiffs' counsel.

There is no exact formula to determine whether a verdict for compensatory damages is excessive and, of course, each case must be considered on it own merits. *Larabee v. Washington*, 793 at 360, a personal injury case, indicates that in evaluating the excessiveness of an award, the reviewing court should consider the evidence in the case and the verdict in light of the following factors: (1) loss of income, present and future, (2) medical expenses, (3) [decedent's] age, (4) the nature and extent of the injuries, (5) economic factors, (6) awards given and approved in comparable cases, and (7) the superior opportunity for the jury and trial court to appraise [decedent's] injuries and other damages.

Guidance may also be taken from the Wrongful Death Act. The persons entitled to recover under the wrongful death statute are identified in Section 537.080.1(1) as the spouse, children, and parents of the deceased - all of whom were plaintiffs below. Wrongful death damages are governed by Section 537.090 which provides:

> [T]he trier of facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of services, consortium, companionship, comfort, instruction, guidance, counsel training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death . . . In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued. The mitigating or aggravating circumstances attending the death may be considered by the trier of facts, but damages for grief and bereavement by reason of death shall not be recoverable.

A factor to be considered in evaluating damages under the Wrongful Death Act is potential financial aid by the decedent, which can be shown through evidence of the decedent's health, character, talents, earning capacity, life expectancy, age and habits. *Kilmer v. Browning*, 806 S.W.2d 75, 81 (Mo. App. 1991). In computing the loss of consortium for the loss of a parent for a child, or the loss of a child for a parent, factors such as the physical, emotional, and psychological relationship between the parent and child must be considered. *Kilmer*, 806 S.W.2d at 81.

Any pain and suffering the decedent may have endured shall also be considered in determining damages. Section 537.090. The range between an inadequate award and an excessive award for pain and suffering can be enormous, each case depends upon its own particular facts. *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1301 (8th Cir. 1987). Substantial disparity among juries as to what constitutes pain and suffering must be expected. As the Eighth Circuit Court of Appeals stated,

> This is a litigious fact of life of which counsel, clients, and insurance carriers are fully aware. Once they place their fate in the hands of a jury, then they should be prepared for the result. . . .They cannot expect the [c]ourt to extricate them in all cases where the award is higher or lower than hoped for or anticipated.

Morrissey v. Welsh Co., 821 F.2d at 1301(citations omitted).

In light of these general principles of law, a review of the evidence favorable to the compensatory damage award is in order. The purely economic damages attributable to Barnett's death are undisputed, both sides agree that $649,080.00 represents the lost past and future earnings, benefits and household services related to James Barnett's death. As a result, the non-economic losses, when applying the trial court's remittitur of compensatory damages to $25 million, amount to $24,350,920.00 in non-economic damages. The non-economic losses for wrong-

ful death require this court to properly consider the reasonable value of services, consortium, companionship, comfort, instruction, guidance, counsel, training and support, as well as any pain and suffering which the deceased may have suffered. Section 537.090.

At the time of his death, James Barnett, Jr., was forty years old and was in good health. His life expectancy was an additional thirty-six years to age seventy six. His salary was approximately $34,000.00 annually. He was an excellent pilot by all accounts and had been employed as a full-time Life Flight pilot for eight years prior to his death. He received flight training in the military and was licensed for commercial flights. He had been married for fifteen years to Julia Barnett, whom he met during overseas military service. The couple had two young children, Jessie (14) and Mia (12), both of whom enjoyed a close relationship with their father. In addition, he had a close relationship with his parents James and Wanda Barnett. A videotape demonstrating the closeness and intimacy of interactions between James Barnett and his family was admitted into evidence.

Additional factors to consider include the pain and suffering of the deceased prior to death and the number of plaintiffs suffering a loss. Section 537.090. Testimony of the Chief Medical Examiner of Jackson County who performed the autopsy demonstrated that James Barnett consciously suffered pain for three to five minutes as he bled to death after his thoracic aorta was severed upon impact.

Plaintiffs properly point out that the compensatory verdict considers the economic and non-economic losses to five individual plaintiffs. "[A]n element of the total damages is based upon the relationship between the deceased and each individual party to the action." *Call v. Heard,* 925 S.W.2d 840, 851 (Mo. banc 1996). The fact that each of five individuals who were proper plaintiffs under the Wrongful Death Act demonstrated significant non-economic losses stemming from the death of

James Barnett would work to increase the total compensatory award. Under the authority of Section 537.068, and having reviewed and weighed the evidence of economic and non-economic compensatory damage and considering the number of plaintiffs, this court finds that the 25 million compensatory award remains excessive and finds that 3.5 million dollars is an appropriate compensatory damage award and orders remittitur accordingly, providing the plaintiffs accept this figure, otherwise a new trial will be ordered.

B. PUNITIVE DAMAGES

1) Refusal to Grant Directed Verdict

Turbomeca also alleges the trial court erred in refusing to grant a directed verdict on the issue of aggravating circumstances and in submitting the issue to the jury because plaintiffs failed to make a submissible case that: (1) Turbomeca knew of the defective condition of the TU-76 nozzle guide vane at the time the TU-76 left Turbomeca's possession; (2) Turbomeca knew or had reason to know of the high probability that its actions would result in injury; and (3) Turbomeca showed complete indifference to or conscious disregard for the safety of others when they sold or installed the TU-76 nozzle guide vane.

In reviewing the denial of a motion for directed verdict, the evidence presented at trial is viewed in the light most favorable to the non-moving party in order to determine whether or not substantial evidence was introduced which tended to prove facts essential to plaintiff's recovery. *Gamble v. Bost*, 901 S.W.2d 182, 185 (Mo. App. 1995); *Lindsey Masonry Co. V. Jenkins & Assoc.*, 897 S.W.2d 6, 15 (Mo. App. 1995). A case should not be withdrawn from the jury unless the facts in evidence and the inferences fairly deductible therefrom are so strongly against plaintiffs that reasonable minds could not differ. *Bridgeforth v. Proffitt*, 490 S.W.2d 416, 423 (Mo.App.1973).

Section 537.090 provides that in wrongful death cases "[t]he mitigating or aggravating circumstances attending the death may be considered by the trier of facts" in assessing damages. In *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464, 466 (Mo. banc 1995), the Supreme Court of Missouri held that aggravating circumstances damages in wrongful death cases are punitive in nature. Subsequently, in *Call v. Heard,* 925 at 847-849, Missouri's highest court applied a punitive damages analysis in reviewing an award of aggravating circumstances damages under Section 537.090, Missouri's wrongful death statute.[8]

The well-established purpose of punitive damages is to inflict punishment and to serve as an example and a deterrent to similar conduct. *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656, 660 (Mo. banc 1986). Submission of punitive damages in a wrongful death case is proper when the defendant could have reasonably been charged with knowledge of a potentially dangerous situation but failed to act to prevent or reduce the danger. *Kilmer v. Browning*, 806 S.W.2d 75, 80 (Mo. App. 1991).[9]

In the context of products liability actions, the legal standard for submitting punitive damages depends on whether the underlying theory is in strict liability or in negligence. The trial court

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[8]In *Call v. Heard,* the Supreme Court jettisoned the term "aggravating circumstances damages" for "punitive damages," thereby solidifying its holding in *Bennett* that aggravating circumstances damages are the equivalent of punitive damages. *Baker v. General Motors Corp.*, 86 F.3d 811, 817 (8th Cir. 1996). Hence, this opinion, following the Supreme Court of Missouri's opinion in Call, refers to the Wrongful Death Act's aggravating circumstances damages as punitive damages.

[9]In *Kilmer v. Browning,* a wrongful death case brought against the landlord and gas company when a tenant died of carbon monoxide asphyxiation, the court held that failing to adequately examine a carbon monoxide venting system, or ignoring the system's defective condition, was indicative of indifference to the safety of others, and justified submitting punitive damages to the jury. *Kilmer v. Browning*, 806 S.W.2d at 80.

submitted both theories to the jury. Under a negligence theory, punitive damages may be awarded if the defendant showed complete indifference to or a conscious disregard for the safety of others. *Stojkovic v. Weller*, 802 S.W.2d 152, 155 (Mo. banc 1991) (citing *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 73 (Mo. banc 1990)). Missouri cases have interpreted "complete indifference to or a conscious disregard for the safety of others" to mean if the defendant knew or had reason to know that there was a high degree of probability that the action would result in injury. *Hoover's Dairy, Inc. v. Mid-American Dairymen,* 700 S.W.2d 426, 436 (Mo. banc 1985); *Sharp v. Robberson,* 495 S.W.2d 394, 397 (Mo. banc 1973). In a strict liability case, punitive damages are properly submitted where (1) the defendant showed complete indifference to or a conscious disregard for the safety of others, and (2) the defendant introduced the offending product into commerce with actual knowledge of the product's defect. *Angotti v. Celotex Corp.*, 812 S.W.2d 742, 746 (Mo. App. 1991).

A review of the evidence presented at trial reveals that substantial evidence existed from which the trial court could determine that plaintiffs had made a submissible case for punitive damages. Testimony by Turbomeca's own officers indicates complete indifference to, and a conscious disregard for, the safety of others. Jean Meliet, a mechanical engineer who has been Turbomeca's Customer Technical Support Manager since 1989, testified at trial that he knew in 1986 or 1987 that a problem caused by moving parts rubbing on non-moving parts were causing a deterioration that resulted in engine shutdowns. (See timeline, June 1986, Saviot report). He agreed that, in 1986, the Saviot report revealed a serious TU-76 problem. At trial, the following dialogue followed:

> Q. Now, notwithstanding the fact you know you have a serious problem with the TU-76, you still keep manufacturing ARRIEL engines with the TU-76 modifica-

tions in them without making changes; isn't that true, in design?

A. Yes.

Q. And you keep manufacturing them and selling them without changing the metal, correct?

A. Yes.

Q. And literally hundreds and hundreds of these engines with the weak metal get manufactured and sold after June 9 of 1986, correct?

A. Yes.

Q. And that goes out on new aircraft and when people bring their engines back for overhaul, TU-76 with this weak metal gets put right back in them correct?

A. Yes.

Q. And during that period of time the number of these cracks and the ruptures and the incidents and the accidents starts mount in, doesn't it?

A. Yes.

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Q. So, we know a third of these engines with this part in it with a bad metal are coming here to this country, correct?

A. Yes

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Q. You know anybody within your company, Turbomeca, whoever expressed a concern that due to the TU-76 experience that we'd better recall this because someone is going to get hurt or maybe killed?

A. No.

Meliet was in charge of the first two service letters (See timeline March, 1991 and December, 1992) sent to Turbomeca's customers. He made a conscious decision not to include information of in-flight shutdowns and failures in the letters, nor to advise helicopter owners of the safety situation involved with the modified TU-76 part. Safety, as far as Turbomeca was concerned, was not directly related to the cracks in the TU-76. "The in-flight deterioration of a TU 76 leads only to an in-flight shutdown of the engine. That's all." According to Turbomeca officers, an in-flight loss of engine power did not constitute an emergency, rather they simply stated "the pilot must be in a position to land this helicopter in safety."

At trial, Meliet agreed it would have been a large expense to have the TU-76 replaced, at Turbomeca's cost, in all Turbomeca helicopters world-wide.[10] In addition, Meliet admitted the impetus to extend the time between overhauls (See timeline May 1988) was for better sales, and that it would have been possibly bad for sales to have included the safety concerns connected with the TU-76. The Life Flight helicopter in this case had 2482 flight hours at the time of the accident, thus, had Turbomeca not extended the time between overhauls from 2000 to 2500, the accident in this case would have never occurred.

Alain Calemard, the vice-president for engineering and the technical manager of 670+ persons, including 150 engineers at Turbomeca, admitted the problem of cracking and disintegration around the hub was known to Turbomeca in June 1986, and that this problem led to in-flight failures of engines. He admitted that the cracking in the TU-76 developed after relatively few hours

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[10] Turbomeca officers, Dennis Nichols and Steven Ives both testified that a retrofit of the Replacement (TU-202) during a recall would have cost Turbomeca $17,000 per helicopter, with approximately 2850 helicopters world-wide using the defective TU-76.

of usage, and often occurred prior to "Turbomeca's prescribed limits" for overhaul service. He also said that in 1991, Turbomeca made mandatory for a customer to change another part of the engine -- but not this part. Only the French military was advised of the existence of the Replacement part.

The testimony at trial established that a manufacturer has a sales advantage if it can lengthen the time between overhauls, because not only does the helicopter owner pay for overhauls,[11] but the helicopter is out of service during that time. Calamard agreed that the May 1988 Turbomeca extension for overhaul from 2000 to 2500 hours (some two years after the 1986 Saviot report), was "significant", and came after ". . . we already knew of a number of failures of the TU 76 standard nozzle guide vane."

Based on Meliet and Calamard's testimony at trial, as well as the testimony of several other Turbomeca officers (see Point B *infra*), there was ample evidence from which the trial court could determine the submission of punitive damages was proper. Denial of the directed verdict and submission of punitive damages was not error. Point denied.

2) Remittitur of Damages

Turbomeca next alleges the trial court erred in denying its motion for a new trial and refusing to further remit punitive damages because the judgment: (1) remains grossly excessive, the product of misconduct by plaintiff's counsel; (2) constitutes an excessive fine under the Eighth Amendment; (3) denies the defendants due process; and (4) shocks the conscience of the court and demonstrates bias, passion and prejudice.

Generally, the decision to award punitive damages is peculiarly committed to the jury and trial court's discretion, and the

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[11] Dennis Nichols, president of Turbomeca Engine Corp., testified that an overhaul costs a helicopter owner, on average, between $90,000 and $140,000.

appellate court will only interfere in extreme cases. *Fust v. Francois*, 913 S.W.2d 38, 50 (Mo. App. 1995); *Young v. Jack Boring's, Inc.*, 540 S.W.2d 887, 898 (Mo. App. 1976). When a jury awards punitive damages, "both the trial court . . . and the appellate court review the award to ensure that it is not an abuse of discretion." *Call v. Heard*, 925 at 849. On appellate review, an abuse of discretion is established when the size of the punitive award is so disproportionate to the relevant factors that it reveals improper motives or a clear absence of the honest exercise of judgment. *Id.* at 849 (citing *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719, 724 (Mo.1966)). Only when the amount is manifestly unjust will appellate courts interfere with or reduce the size of a verdict. *Ball v. Burlington Northern R. Co.*, 672 S.W.2d 358, 363 (Mo. App. 1984).

Unfortunately no "punctilious prescription", no brightline test, exists to determine if a punitive damage award is excessive. *Hodges v. Johnson,* 417 S.W.2d 685, 690 (Mo.App. 1967). While an appellate court can look to other decided cases for guidance, they are often not determinative, for each case presents its own peculiar facts and circumstances which must be evaluated. *Id.* at 689; see also *Huffman v. Young*, 478 S.W.2d 332, 333 (Mo. 1972). It is because of the unique facts and circumstances of each case that no fixed mathematical relation, between the amount of actual damages and the amount of punitive damages, can exist. However, the amount of the punitive award must somehow be related to the wrongful act and the actual or potential injury resulting therefrom. *Call v. Heard*, 925 S.W.2d at 849. If the jury's verdict appears to be grossly excessive, outrageous, or the result of an honest mistake, so as to be obviously disproportionate to the injury shown, it is the duty of the court to modify the verdict. *Cates v. Eddy*, 669 P.2d 912, 920-21 (Wyo. 1983); 52 Am.Jur.2d 251.

Fortunately, juries, even in the most complicated cases, generally achieve good results. It is true, however, that no system is

perfect and on occasion a jury will reach an incorrect result in the eyes of all reasonable persons. "[A] jury is not free to award any sum it might choose, however large or small, whether from anger, sorrow, prejudice, mistake, or other improper cause" *Cates v. Eddy*, 669 P.2d at 920; 35 A.L.R.2d 308. Although considerable latitude is afforded the jury in arriving at a punitive award, the award must fall within a range, however large, that is acceptable under the Due Process Clause of the 14th Amendment. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994).

The Supreme Court of Missouri has held that aggravating circumstances damages in wrongful death cases are the equivalent of punitive damages and that due process safeguards are required. *Bennett v. Owens-Corning Fiberglas Corp.* 896 S.W.2d 464, 466 (Mo. banc 1995). Procedurally, the Due Process Clause of the 14th Amendment requires that adequate standards and controls be in place to prevent a punitive damage award from becoming an arbitrary deprivation of property.[12] *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18-19 (1991). Substantively, a punitive award cannot be so "grossly excessive" in relation to the state's interests in punishment and deterrence that it enters into the "zone of arbitrariness" that violates the Due Process Clause. *BMW v. Gore*, 116 S.Ct. 1589, 1595 (1996). In *BMW*, the United States Supreme Court set out three guideposts for determining when a punitive damages award is so excessive as to violate a defendant's due process rights: (1) the degree of reprehensibility of the defendant's conduct, (2) whether there is a reasonable relationship between the punitive damages award and the harm that has either occurred or is likely to result from the defendant's conduct, and (3) the difference between this remedy and the civil or criminal penalties authorized or imposed in comparable cases. *Id.* at 1598-99, 1602. *See also TXO Produc-*

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[12] Because Turbomeca does not argue on appeal that Missouri's standards and controls are so inadequate as to violate due process, this issue is outside the scope of this opinion.

tion Corp. v. Alliance Resources Corp., 509 U.S. 443, 459-460 (1993).

With these cases in mind, this court must both: (1) review the court's remittitur under the guideposts set forth in *BMW*, to determine if the punitive award remains grossly excessive so as to violate due process; and (2) review the remitted amount under the factors set out in Missouri's case law, to determine if the trial court's remittitur constitutes an abuse of discretion so as to require further remittitur or a new trial.

The constitutional inquiry begins by looking at the reprehensibility of the defendants' conduct. *BMW v. Gore*, 116 S.Ct. at 1599. Reprehensibility is perhaps the most important indicium of the reasonableness of a punitive damage award. *Id.* A review of the trial testimony of Turbomeca's own officers reveals the degree of reprehensibility of the defendants.

Albert Ducrocq, the vice president of Turbomeca's "Airworthiness Department,"[13] admitted, like Meliet and Calamard, that the cracks in the TU-76 were due to "thermal fatigue," and that the rubbing of the hub against the turbine could cause an engine to sustain a power loss or shutdown in flight. He further admitted that "[t]he TU-76 doesn't achieve what we would want as a goal for [a] reliable part." In spite of this admission, Ducrocq then testified that an in-flight engine shutdown, caused by a defective TU-76, would not render the engine "unairworthy," but rather *might* create a "potential[ly] dangerous situation."

This obvious failure by Turbomeca's officers to recognize the severity of the situation was further illustrated by its repeated decision to not report in-flight engine failures to the helicopter owners, or the FAA, even though the in-flight failures warranted

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[13] Turbomeca's Airworthiness Department manages the "airworthiness" of all engines in service and reports to the FAA and its French equivalent, the DGAC.

critical internal reports. In response to questions about incidents not reported to the FAA or the DGAC, Ducrocq replied in one such case, where Turbomeca's internal report stated that a locking engine caused "a brutal whiplash in power," that the occurrence was merely "a malfunction," but ". . . not necessarily what we call an incident." Ducrocq was later asked about the May 26, 1993, Phoenix TV station incident (see timeline -- this was the second failure of this particular engine), and could not give a reason why this event, though causing an internal Turbomeca report, would not merit its listing in answer to the FAA inquiry.[14]

The following questions and answers are illustrative of Turbomeca's senior safety person's forthrightness, engineering acumen, and attitude toward the situation created by the modified part:

Q. And would you agree that if the pilot hears a loud bang coming from the engine compartment, it is prudent to make a precautionary landing?

A. This is left to his own judgment.

Q. Well, a loud bang from the engine compartment is not something that a pilot would normally hear within the normal flight parameters of the aircraft, correct?

A. I -- I have no idea what is a loud bang.

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[14] A third event not reported was the May 22, 1993 incident in Houston where the pilot heard a "loud bang," and made a precautionary landing. The fourth event not reported was the February 15, 1993 Virginia incident where, on the return flight, after the pilot heard a loud bang, power fell to 83 percent, and after another bang power went to 51 percent, prior to a forced landing. Again, this event was the subject of an internal report, but not included in the June report to the FAA. The same holds true for the very first accident involving the modified TU-76 where there was an in-flight failure in the Congo. (see timeline June-July 1985).

Q. . . . these engines are not supposed to create a loud bang in flight, are they?

A. I -- I know this engine running in test status, not on helicopter. So, I can't make any judgment about the noise it can produce once they're installed.

Q. Yes, sir, but you've never heard in the test situation a normal engine make a loud bang as described here, have you?

A. A loud bang in the test cell would be judged unnormal.

After several more questions Ducrocq then admitted the failure was due to the same problem that caused the accident in this case. Ducrocq also testified that many of the occurrences not reported to the FAA were reported to the French DGAC.

The reprehensibility of Turbomeca's conduct is unparallelled, considering that Turbomeca knew the TU-76 was defective and had discussed incidents resulting from the TU-76's failure internally, but did not find it necessary to either: inform the helicopter owners of the in-flight failures, notify the FAA of such incidents, or conduct a recall of the defective TU-76 part.

From the evidence it can easily be inferred that Turbomeca's decision-making was motivated solely by economics. The crash in this case, plus the two failures in February and July of 1994, prompted a Turbomeca meeting, in the summer of 1994, at the home office ". . . to ask ourselves, why does this keep happening." The following colloquy about the meeting is now recounted:

Q. And Mr. Ducrocq, in evaluating the situation, certainly you all discussed what other options had been in the past available to the company and what options were still available, true?

A. True.

Q. One of the options that had been available from the beginning with respect to [the] TU-76 was something we had discussed before and that is to plainly and simply remove it at the earliest opportunity, right?

A. That's a possible action.

Q. anyone at that committee express any regret or concern that that particular remedial action had not been taken before hand, sir?

A. Not that I remember.

In fact, according to the head of Customer Support, the decision was made in 1991 to offer the Replacement part only to certain owners, but no replacement would be installed in U.S. helicopters, "until the engine [was] taken to a repair facility."

With knowledge that there were 1300 to 1400 TU 76's in use worldwide, of which 200 were in use in the United States, the meeting of the executives resulted in a decision to not recall the parts and to wait until the scheduled overhaul to change the defective part. During overhaul the helicopter owner, rather than Turbomeca, is responsible for paying for any replacement parts. As a result, Turbomeca could avoid the cost of replacing the defective TU-76's during a recall, and instead could charge the owner for the replacement nozzle guide vane while overhauling the engine.[15]

[15] As discussed, *supra*, another indication that Turbomeca was motivated solely by economics was Turbomeca's decision, in spite of Nichols testimony that increasing the time between overhauls would increase the chance of TU-76 failures, to extend the length of time between overhauls in order to gain a sales advantage over competitors.

Steven Ives stated that the owner would pay for the retrofit of the New or Replacement part, unless Turbomeca of France consented. Somewhat contrary to who bore the cost of replacing the modified TU-76s, Ives then said that if the customer brought in a defective nozzle guide vane, Turbomeca had a policy by which it would pay for the retrofit. However, Ives knew of no service letter or of any correspondence sent by Turbomeca or Turbomeca Engine to any of its customers explaining that this policy existed.

In an attempt to justify the decision to not recall the TU-76, Ducrocq testified that a mandatory recall and replacement, was A. . . not necessary because the other actions which were put in place have proven efficient." However, he then admitted that had the replacement part been on the life flight helicopter in this case, Barnett would have been alive. The "other actions" that Ducrocq found to be "efficient" consisted of a series of service letters and bulletins sent to the helicopter owners to suggest that the owners listen for "rubbing noises" before and after shutdown of the engine. In reality, these service letters did little to inform the owners of the seriousness of the situation and nothing to inform them that the TU-76 was defective or that it could result in an in-flight engine failure.

Steven Ives, the manager of Technical Services for Turbomeca Engine, as well as several others who testified, have never personally heard the "rubbing" noises mentioned in the service letters and bulletins. In addition, none of Turbomeca's officers could state that any pilot, mechanic, owner, or accident report had ever mentioned hearing a rubbing noise.

Dennis Nichols, president of Turbomeca Engine,[16] testified that he became aware of the problem in 1991, the date of the first service letters, and that prior to May 27, 1993, North American customers were advised of the problems with the TU-76 through the service letters and bulletins. His testimony was as follows:

> Q. Well sir we can go through the service letters and service bulletins as much as you like, and I invite you to look at them. They're right in front of you. But did they ever tell the customer that the TU-76 nozzle guide vane is defective and dangerous and could result in in-flight power failure?

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[16] Turbomeca Engine supports and maintains all Turbomeca aircraft in North America, about one third of the world-wide fleet.

A. I don't believe that I have read words of that nature in any of the documents.

Q. But that's true isn't it?

A. It's inappropriate for me to -- I'm not a technical expert. I -- I can't say that.

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Q. Well, do you know, as president of the corporation, whether it's true or not that the TU-76 nozzle guide vane is a -- defective component?

A. Would you state the question again, please?

Q. Do you know as president of Turbomeca Engine Corporation whether the TU 76 nozzle guide vane is a defective component?

A. Yes.

Q. And did you know that it was defective before May 27, 1993?

A. I--I can't say.

Nichols agreed that one possibility to have corrected the problem as quickly as possible would have been for the company to recall the engines and retrofit them with the Replacement (TU-202) at Turbomeca's expense. He also admitted that waiting for an overhaul, or increasing the time between overhauls, would increase the chance of TU-76 failures.

Q. . . . [N]ow the reason that . . . Turbomeca . . . took the position that we're going to wait until overhaul time and take the chance of failure in the interim of some of these part, is one of cost, isn't it?

A. I agree with that statement.

In July, 1994, the time of the Nichols deposition, he was asked if any decision had been made on the remaining aircraft for a recall, and he answered, . . . "there's been no decision."

Steven Ives investigated the crash in this case, as well as the one the day before in Phoenix and gathered the documents for the National Transportation Safety Board, ("NTSB") which had requested the number of previous failures. Like Nichols, he testified there were still engines "out there" flying with the defective TU-76 part. According to the service bulletins, it would take but two hours of a mechanic's time to install the Replacement on the Life Flight helicopter. Neither Ives nor anyone else at Turbomeca Engine told any owner or operator, including Rocky Mountain, that there was a defective part in these engines that created a potentially deadly situation.

Neither Ives, nor anyone else at Turbomeca Engine, questioned Turbomeca about TU-76 problems world wide. It was only after the accident in this case, coupled with the requests of the two U.S. agencies, that a comprehensive compilation was prepared. Ives admits to thirteen world-wide accidents or forced landings, all caused by the TU-76 part, occurring prior to the accident in the case at bar. He admitted this was an important number, and that it did not correspond with the figure of six priors as reported by Turbomeca to the FAA and NTSB.

Carey Brown, Turbomeca Engine's director of customer support, and Ives' superior, testified as follows,

"Q. Mr. Brown, when did you first become aware of any . . . problems . . . associated with the . . . TU-76?

A. I don't know when I first became aware . . .

Q. Was it before the crash of Life Flight?

A. I was not aware of any ongoing problems . . .

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I still do not myself know that the nozzle was the -- problem."

Then when asked what he did when problems were discovered, he said, "I did -- basically, when the various service letters came out, we simply administered those service letters."

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Q. And you did not have any knowledge as to either the severity or widespread nature of the TU-76 problem; is that correct, sir?

A. That's correct.

Q. Do you have a mechanical background, Mr. Brown?

A. Yes, I do.

Q. Do you have enough mechanical background to know that a failure of the TU-76 nozzle guide vane could lead to a catastrophic crash?

A. No, I don't.

Q. That's not something within your knowledge as the director of the customer support department?

A. No, it's not.

***

Q. Did Turbomeca Engine Corporation ever notify its customers about a potential problem with the TU-76 design, sir?

A. I am still confused by the question.

Q. Well, did you or did you not send out any information or alert to your customers that these things were cracking and had the potential to kill or seriously injure people?

A. No.

Brown had not read the NTSB report, nor was he familiar with anything specific pertaining to the TU-76 problem.

Q. Well, with all of that in mind, Mr. Brown, I'm wondering as the director of technical support for this entire corporation, what is it that you do?

A. I manage the department.

Given the testimony of Turbomeca's own officers, it is not difficult to understand why a large punitive damage amount was awarded. Turbomeca's conduct was unquestionably reprehensible.

The second indicium of a grossly excessive punitive award is its ratio to the actual and potential harm to the plaintiff. *Id.* at 1601. The trial court's remittitur of $87.5 million in punitive damages, and to $25 million in compensatory damages exhibits a ratio of just over 3:1. For only illustrative purposes, it is noted the Supreme Court of the United States previously approved a ratio of 526:1 as not being in violation of the Due Process Clause of the 14th Amendment in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993). While such a ratio might not be proper here, it is evident there is no pre-set or magic ratio of actual to punitive damages. This court concludes that the trial court's remittitur evinces a "reasonable relationship" between actual and punitive damages given the nature of Turbomeca's conduct. *BMW v. Gore*, 116 S.Ct. 1589, 1601 (1996).

Finally the third factor in determining whether a punitive damage award violates the Due Process Clause is the difference between this remedy and the civil or criminal penalties authorized or imposed in comparable cases. *BMW v. Gore*, 116 S.Ct. at 1599. Given the testimony of Turbomeca's officers and the other evidence presented at trial, it appears that the punitive

damage award given was the only real way to deter the conduct of Turbomeca. The evidence has demonstrated that Turbomeca's decisions were solely based on economics. In addition, it could not reasonably be said that Turbomeca did not have adequate "notice" of the severity of the sanction that might befall them as a result of their conduct. The aforementioned testimony reveals this fact.

To supplement the requirements set out above for the imposition of punitive damages, the courts of this state have identified a variety of factors, a nonexclusive list, that should be considered in determining whether the trial court abused its discretion in not further remitting the jury's punitive award. Several factors may be considered, including: (1) the degree of malice or outrageousness of the defendant's conduct, *State ex rel. St. Joseph Belt Ry. Co. v. Shain*, 108 S.W.2d 351, 356 (Mo.1937); (2) aggravating and mitigating circumstances, *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719, 724 (Mo. 1966); (3) the defendant's financial status, *Id.* at 724.; (4) the character of both parties, *Maugh v. Chrysler Corp.*, 818 S.W.2d 658, 662 (Mo.App.1991); *Holcroft v. MKT RR Co.*, 607 S.W.2d 158, 164 (Mo.App.1980); (5) the injury suffered; *Moore v. Missouri-Nebraska Exp., Inc.*, 892 S.W.2d 696, 714 (Mo.App.1994); (6) the defendant's standing or intelligence, *Id.;* (7) the age of the injured party, *State ex rel. St. Joseph Belt Ry. Co.*, 108 S.W.2d at 356; and (8) the relationship between the two parties. *Call v. Heard*, 925 S.W.2d at 849 (citing *Moore v. Missouri-Nebraska Exp., Inc.*, 892 S.W.2d 696, 714 (Mo. App.1994)). Each of these factors has been addressed in the discussion above.

It is a fact, a sad fact gleaned from *all* witnesses, that this accident resulted from the defect in the modified TU-76. Had the replacement TU-202 been installed, the module that used a different metal, there would have been no "metal fatigue" leading to the failure. What Turbomeca's own records, and indeed the early conclusions of their engineers show, is the

fatigue or stress was brought on by a flight, followed by a short wait, and then a return trip (see time line incident February, 1990) -- exactly the scenario for air rescue or air transport of fragile patients in need of emergency care. Turbomeca advertised the use of this helicopter for emergency medical transport. Turbomeca's reliance on experienced pilots being able to autorotate to a forced landing in such unexpected emergency situations as loss of power, with such a cargo, is void of any support and totally unrealistic.

Turbomeca's post-accident under-reporting of prior failures of the modified TU-76, however, pales in comparison to the lack of forthrightness to its customers. Turbomeca's failure to be candid with owners about the well-documented dangers of their product, was evidenced by the diversionary tactic of directing persons to listen for rubbing sounds. The company always seemed to be motivated by cutting costs, saving money and increasing sales -- all at the expense of the unlucky owners. The TU-76 was modified to save money. The New and Replacement parts took longer to implement for some customers than to build the entire original engine because of "being blocked" by its Commercial Sales Department. Its laissez-faire attitude of never notifying, even post-*Letz* and *Barnett,* owners of the lethal, undetectable dangers inherent in the modified TU-76, along with its net worth and financial ability justifies the imposition here of substantial punitive damages.

While this court concludes that the remitted judgment of $87.5 million entered by the trial court is excessive, the court finds in light of the relevant factors and considering all the evidence, and giving deference to this court's unanimous opinion this day in *Letz*, that $26.5 million is the amount to be rendered against Turbomeca as punitive damages in this case. Considering the extreme reprehensibility of Turbomeca's conduct and the other relevant factors, this court does not believe this punitive award,

as now remitted, is grossly excessive as to violate the Due Process Clause of the 14th Amendment.

THE BARNETTS' CROSS APPEAL -- THE STATUTORY CREDIT

The relationship between this case and Letz, and the reason both decisions are being handed down the same day, is exemplified by the cross-appeal of the plaintiffs. The over-arching question here is whether, under Section 510.263.4, a trial court may grant a punitive damage credit in a second case, for punitive damages awarded, but not yet paid, in a prior case, that arise out of the same incident, when the prior case is on appeal?

The facts vis-a-vis a credit are as follows. The Barnett trial started in June of 1995. In *Letz,* which was tried first, an amended judgment was entered in August 1995. Turbomeca subsequently appealed and the case was heard by this court en banc. As the reader will remember, there was no bifurcation of compensatory and punitive damage awards in *Letz.* After the verdicts in Barnett, Turbomeca timely filed for a punitive damage credit under 510.263.4. Since the *Letz* verdict was not bifurcated, the Barnett trial court determined one-half of the $70 million judgment was punitive, and accordingly, applied a $35 million credit to the remitted Barnett punitive damage award. The Barnetts' primary basis for appealing Turbomeca's punitive damage credit is that no punitive damages award has been paid by Turbomeca in *Letz.*

The confusion caused by this point is due to the language of the statute, which simply does not envision the situation in this case --where there are separate trials, one soon after the other, with the same facts and the same aggravating circumstances, and both cases pend on appeal. Section 510.263.4 states in pertinent part:

> Within the time for filing a motion for new trial, a defendant may file a post-trial motion requesting the amount awarded

> by the jury as punitive damages be credited by the court with *amounts previously paid* by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based. At any hearing, the burden on all issues relating to such a credit shall be on the defendant and either party may introduce relevant evidence on such motion. Such a motion shall be determined by the trial court within the time and according to procedures applicable to motions for new trial. If the trial court sustains such a motion the trial court shall credit the jury award of punitive damages by the *amount* found by the trial court to have been *previously paid* by the defendant arising out of the same conduct and enter judgment accordingly. (Emphasis Added).

Paraphrased, the other pertinent portions of this subsection require the trial court to deny the credit if it finds: 1) that the defendant failed to establish entitlement to a credit or, 2) the conduct in the second case was not the same conduct on which the imposition of punitives was based on in the prior case, or 3) that the defendant unreasonably continued [its] conduct after acquiring actual knowledge "of the dangerous nature of such conduct . . .[17] Section 510.263.4.

The Barnetts ask for a strict construction of the statutory language, and argue that the statute requires that after thirty days following entry of judgment if the prior judgment has not been paid, then no credit may be allowed in the second suit.[18]

---

[17] It appears that Missouri's statutory credit mechanism is unique. Georgia at one time had a credit legislation. Offering a credit is an alternative to caps on punitive or aggravating awards. The Missouri General Assembly should not be criticized for allowing, but not mandating, a credit to avoid redundant punishment.

[18] Section 510.263.4 requires the post-trial motions to be filed within the time for filing a motion for new trial. Rule 78.04 states that such time will not exceed 30 days after entry of judgment.

Somewhat surprisingly, there are very few cases that have interpreted Section 510.263.4. This may, in part, be due to the numerous pitfalls and snarls encountered with implementation of the statutory credit. For example, consider what happens if no appeal is taken in *Barnett*, and *Letz* is appealed and results in a punitive award other than $26.5 million. Such a situation, when interpreted under Section 510.263.4, would result in confusion because Barnett would then become the first judgment paid. As a result, *Letz*, which then becomes the second judgment, could not receive a credit for Barnett since the defendant in *Letz* did not apply for a credit as required by the statute -- within 30 days after entry of judgment. The defendant in *Letz* never applied for a credit because it was the first case tried and there was no reason to ask for a credit at that time. This possible scenario would unwittingly force a defendant to illogically apply for a credit that does not exist at the time it is sought, and may never come into existence. In addition, even if Letz resulted in a higher punitive award than Barnett, the defendant could not, under the statute, obtain a credit for the amount paid in Barnett.

As has been stated earlier in this opinion, the purpose of punitive damages is to inflict punishment and deter similar misconduct and not to allow punishment over and over again for the same previous conduct. Punitive damages are not to reward plaintiffs, but to punish and deter defendants. *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 75 (Mo.banc 1990). To allow excessive financial punishment invites a constitutional due process violation. In *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 231 (Mo. App. 1988), a case involving numerous plaintiffs who were damaged by the defendant's noxious emissions, the court upheld the defendant's liability for actual and punitive damages, but reversed only for the purpose of adjudicating the proper amount of damages. The court in *Elam* said: "It is a desideratum of the statute [S. 510.262.4] that a defendant not be required to pay redundant punitive damages based on the same conduct."

The long and short is that the statutory credit under Section 510.262.4 just won't adjust to these facts where two cases pend and are ripe for adjudication in one court at the same time. The statute's language allows a credit to be given only for "amounts previously paid." Rather than attempt to make the statute fit by allowing a larger judgment in Barnett and a "conditional" credit when and if *Letz* is paid, the court feels the overall effect of both cases and the remitted amounts of punitive damages in *each* case, when combined, reach the proper result and supply the relief that the credit statute envisions and the United State's Supreme Court has enunciated: that total punitive damages, where there are successive suits, will not go beyond due process limits in punishment and deterrence. As the Appendix shows, Turbomeca will have to pay a total of $26.5 million in punitive damages in each for *Letz* and Barnett. These amounts, when considered together are deemed sufficient to judicially accomplish a total result that is not excessive, nor unduly harsh by repeated punishment. The trial court's granting of a credit on the cross-appeal is reversed.

The wrongful death statute allows the jury to consider both aggravating and mitigating circumstances. Section 537.090. Missouri courts have long held that mitigating circumstances are a factor appellate courts must consider when remitting the trial court's judgment. *Moore v. Missouri Nebraska, Inc.* 892 S.W.2d at 714 (Mo App. 1994); *Beggs v. Universal CIT Credit Corp.* 409 S.W.2d at 724 (Mo. 1966). In reviewing the jury's verdict, the trial court, as well as the appellate court, must consider both previous and pending judgments against the defendant as mitigating circumstances when the prior judgment was for the same conduct as the conduct at issue before them. The burden is on the defendant to establish that previous or pending punitive damage judgments against the defendant result from the same conduct at issue in the present case. The defendant is certainly in the best position to know of previous or pending judgments against them.

By giving consideration to other judgments upon a request for remittitur, the appellate court can in the spirit of Section 510.263.4, effectuate the goal of the credit statute -- to prevent repetitive punitive awards for the same conduct.

The court realizes trial judges may be put in an unenviable position where a credit is timely requested by a defendant and other cases involving judgments against the same defendant are still pending. However, under these types of circumstances, where the statute does not apply, judges should attempt to use discretion in affording relief to keep punitive awards within due process limits. The legislature is encouraged to immediately revisit Section 510.263.4.

Except for the points on the excessive amounts of compensatory and punitive damages, all of Turbomeca's points are denied. The trial court's grant of a $35 million credit is reversed. If the Barnetts agree, within fifteen days of this court's mandate, to remit the total judgment against both defendants for compensatory damages to $3.5 million, and of punitive damages to $26.5 million, this judgment shall stand as of the date of the original date of judgment. Otherwise, that judgment is reversed and remanded for a new trial on damages.

Harold L. Lowenstein

All Concur.

APPENDIX

	Letz		Barnett	
	Actual	Punitive	Actual	Punitive
TRIAL COURT				
Jury's verdict:	combined	$70 m	$175 m	$175 m
Judgment after *Barnett* Trial Ct's Remittitur:			$25 m	$87.5 m
Barnett Trial Ct's damages allocation to determine Credit[19]:	$35 m	$35 m		
Trial Ct's Punitive Damage Credit:				$35 m credit
Net Judgment after Trial Ct's Credit:			$25 m	$52.5 m
APPELLATE ACTION				
Mandate Amount after the Court's Remittitur	$2.5 m	$26.5 m	$3.5 m	$26.5 m

Total Payment by Turbomeca under *Letz* and *Barnett* decisions: $59 million

---

[19] Because the *Letz* trial occurred prior to the Supreme Court's decision in *Barnett*, the *Letz* jury did not render separate compensatory and punitive damage verdicts. As a result, the *Barnett* trial court, in order to determine the punitive damage credit under Section 510.263, attempted to determine the portion of the combined $70 million verdict in *Letz* that constituted punitive damages.

APPENDIX B

IN THE SUPREME COURT OF MISSOURI

No. 80559
W.D. No. 53655

January Session, 1998

Kyong Ju Barnett, et al.,
Respondents-Appellants,
vs. (TRANSFER)
La Societe Anonyme Turbomeca France
a/k/a/ Turbomeca, S.A., and Turbomeca Engine Corporation,
Appellants-Respondents.

Now at this day, consideration of Appellants-Respondents' application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 1998, and on the 24th day of March, 1998, in the above entitled cause.

Give under my hand and seal of said Court, at the City of Jefferson, this 24th day of March, 1998

/s/ Thomas F. Simon, Clerk

APPENDIX C

IN THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI AT KANSAS CITY

CASE NO.: CV93-24644

DIVISION: 8

KYONG JU BARNETT, et al.,
PLAINTIFFS

V.

LA SOCIETE ANONYME TURBOMECA FRANCE
A/K/A TURBOMECA, S.A., et al.,
DEFENDANTS.

FINAL JUDGMENT

Pursuant to the Mandate of the Missouri Court of Appeals, Western District and, further, in that Plaintiffs have timely consented to the remittitur in accordance with that Court's Opinion of November 25, 1997, it is hereby

ORDERED, ADJUDGED, AND DECREED THAT final judgment in favor of Plaintiffs be and is entered and affirmed in the amount of $3.5 million ($3,500,000.00) in compensatory damages and $26.5 million ($26,500,000.00) in punitive damages and Plaintiffs shall have and recover pre- and post-judgment interest in the amount of $10,554,745.00[1] as of April 28,

[1] Pre-judgment interest at 9% from 8/23/94 to 7/20/95 (date of verdict and entry of original judgment) is based upon 332/365 days times 9% or 8.1863% and results in pre-judgment interest of $2,455,890.00 (8.1863% times $30,000,000.00). Thus, given that the remitted judgment of $30 million "shall stand as of the date of the original date of judgment," the judgment on 7/20/95 totals $32,455,890.00. Post-judgment interest at 9% simple interest on that judgment yields $2,921,030.14 per year. Accordingly, as of April 28, 1998 the total judgment with pre- and post-judgment interest is $40,554,745.00 with interest accruing at $8,002.82 per day.

1998 for a total Judgment of $40,554,745.00 and interest on the total judgment in the amount of $8,002.82 shall gather day-to-day until the judgment has been satisfied in full.

As set forth in this Court's prior Order of February 20, 1996, the allocations of compensatory damages, interest, and aggravating circumstances (punitive) damages are to be calculated in accordance with the formula contained in the confidential Agreement Among All Plaintiffs dated July 7, 1995, which Agreement has been filed *in camera* and previously approved by the Court. As ordered at that time:

> "In the event the amount of the judgment is revised in any way, or, if for any reason the amounts payable to Plaintiffs upon the judgment are different than the amount thereof, then such revised judgment or amount payable to Plaintiffs shall be re-allocated among the Plaintiffs in accordance with the formula contained in the aforesaid Agreement Among All Plaintiffs dated July 7, 1995, which remains in full force and effect and binding upon all Plaintiffs."

The Mandate of the Missouri Court of Appeals, Western District, enforcing that Court's decision of November 25, 1997 is precisely such an "event" requiring re-allocation of the judgment among the Plaintiffs by this Court.

Accordingly, based upon the formula previously approved by this Court and following the Mandate of the Missouri Court of Appeals, Western District, the original judgment becomes $32,455,890.00 and is re-allocated among the Barnett Plaintiffs as follows:

Kyong Ju Barnett —	$13,666,548.00	(.4211)
Jessie Morgan Barnett —	$ 6,833,274.00	(.21055)
Mia Kyong Barnett —	$ 6,833,274.00	(.21055)

James Barnett, Sr. —	$ 2,561,397.00	(.0789)
Wanda Barnett —	$ 2,561,397.00	(.0789)
Total	$32,455,890.00	(1.0000)

Each Plaintiff shall collect post-judgment interest at the statutory rate of nine percent (9%) per annum until satisfaction based on the foregoing allocations. The percentages following the above allocations represent that Plaintiff's percentage of the judgment. That percentage will be applied, respectively, to compensatory damages, post-judgment interest, and aggravating circumstances (punitive) damages

The allocation of the $3.5 million in compensatory damages among the Plaintiffs is as follows

Kyong Ju Barnett —	$1,473,850.00
Jessie Morgan Barnett —	$ 736,925.00
Mia Kyong Barnett —	$ 796,925.00
James Barnett, Sr. —	$ 276,150.00
Wanda Barnett —	$ 276,150.00
Total	$3,500,000.00

The allocation of the $8,098,855.00 in post-judgment interest among the Plaintiffs is calculated based on each Plaintiff's receiving his or her full share of the statutory nine percent (9%) post-judgment interest as follows:

Kyong Ju Barnett —	$ 3,410,271.00
Jessie Morgan Barnett —	$ 1,705,133.00
Mia Kyong Barnett —	$ 1,705,133.00
James Barnett, Sr. —	$ 639,154.00

Wanda Barnett —	$ 639,154.00
Total	$ 8,098,855.00

As indicated, interest shall accrue daily in the amount of $8,002.82 until this judgment is satisfied and additional interest shall be allocated based on the percentage set forth above.

The allocation of the $26.5 million in aggravating circumstances (punitive) damages among the Plaintiffs is as follows:

Kyong Ju Barnett —	$11,159,150.00
Jessie Morgan Barnett —	$ 5,579,575.00
Mia Kyong Barnett —	$ 5,579,575.00
James Barnett, Sr. —	$ 2,090,850.00
Wanda Barnett —	$ 2,090,850.00
Total	$26,500,000.00

Accordingly, the final judgment is allocated among the Plaintiffs, *en toto,* as follows

Kyong Ju Barnett —	$17,076,819.00
Jessie Morgan Barnett —	$ 8,538,407.00
Mia Kyong Barnett —	$ 8,538,407.00
James Barnett, Sr. —	$ 3,200,556.00
Wanda Barnett —	$ 3,200,556.00
Total	$40,554,745.00

The Court at this time also will address, make findings of fact upon, and rule on the Judgment Lien timely filed by the State of Missouri pursuant to V.A.M.S. § 537.675. That statute provides as follows:

> "Fifty percent of any final judgment awarding punitive damages after the deduction of attorneys' fees and expenses shall be deemed rendered in favor of the State of Missouri."

This Court has previously granted defendant Turbomeca's Motion to add the State of Missouri as a party of this action. The Court does find that the State is a necessary and indispensable party to proper resolution of this action.

Therefore in giving effect to this Final Judgment and pursuant to the dictates of § 537.675, it is thereby necessary that this Court review, take evidence upon and consider the amount of the attorneys' fees as entered into between the respective Plaintiffs and their counsel and the litigation expenses.

As to Plaintiffs Kyong Ju, Jessie, and Mia Barnett, the Court has heard testimony of attorney Mike Thiessen, a tax partner with the Husch & Eppenberger Law Firm. Mr. Thiessen has been the tax advisor to Julia, Jessie, and Mia Barnett from the outset of this litigation. It is Mr. Thiessen's testimony that he has reviewed the litigation expenses incurred by the law firm of Robb & Robb LLC and find all such expenses to be directly related, reasonable, necessary, and appropriate to the litigation.

The Court has heard testimony from Plaintiff Kyong Ju Barnett and Plaintiff Jessie Barnett asking this Court to approve the attorneys' fees of Robb & Robb LLC, as contracted, as well as the litigation expenses. The litigation expenses were reviewed in detail and expressly consented to and approved by the above Plaintiffs. In her capacity as Next Friend for the minor child Mia Barnett, Kyong Ju Barnett also sought approval of the attorneys' fees and litigation expenses.

Notwithstanding the above, in the final analysis it is for this Court alone to determine the reasonableness of attorneys' fees and this Court is considered to be an expert on these matters according to Missouri law and procedure. It should be noted that

this lawsuit was tried before this Court and involved a lengthy four-week trial. The matter involved extensive discovery, sophisticated use of evidence, and trial skills. Given the Plaintiffs' counsel's work during discovery, trial, post-verdict pleadings and, especially, the work on appeal, this Court finds that the attorney's fees as contracted for as between Plaintiffs Kyong Ju, Jessie, and Mia Barnett and the law firm of Robb & Robb LLC are clearly fair, reasonable, and appropriate and this Court hereby

APPROVES specifically the attorneys' fees as contracted for by Plaintiffs Kyong Ju Barnett, Jessie Barnett and Mia Barnett with the Law Firm of Robb & Robb LLC and hereby directs payment of those attorneys' fees as contracted by these Plaintiffs.

NOTWITHSTANDING the above-referenced testimony on litigation expenses, the Court has maintained an ongoing knowledge and awareness of the litigation expenses incurred by Robb & Robb LLC in this matter. Such cases are not handled inexpensively given their complexity. The Court has *in camera* reviewed a complete itemization of Robb & Robb LLC's litigation expenses including all documentary support and hereby makes the express finding that those litigation expenses are hereby approved as fair, reasonable, and necessary expenditures in connection with this litigation and the above Plaintiffs Kyong Ju, Jesse, and Mia Barnett, are hereby ordered to pay such litigation expenses out of this Final Judgment.

Plaintiffs James and Wanda Barnett, Sr. have withdrawn their Motion to Dismiss the State of Missouri as a Party to this Action or, Alternatively, to Determine that the State Has No Interest in a Final Judgment.

THEREFORE, having made the above findings, this Court is now in position to determine the proper award of punitive damages owed to the State of Missouri by Kyong Ju, Jesse and

Mia Barnett and James and Wanda Barnett, Sr. pursuant to § 537.675.

Following the deduction of attorneys' fees and pro rating the litigation expenses among Plaintiffs Kyong Ju, Jessie, and Mia Barnett, the net punitive damages awarded to these Plaintiffs following the statutorily required deduction of fees and expenses is as follows:

Kyong Ju Barnett	Jessie Barnett	Mia Barnett
$3,944,204.00	$1,972,103.00	$1,972,103.00

The Court has reviewed and does hereby approve the attorneys' fees and litigation expenses as among James and Wanda Barnett, Sr., Slagle, Bernard & Gorman, P.C. and Duke W. Ponick, Jr. Following the deduction of attorneys' fees and prorating the litigation expenses among Plaintiffs James Barnett, Sr. and Wanda Barnett, the net punitive damages awarded to these Plaintiffs following the statutorily required deduction of fees and expenses is as follows:

James Barnett, Sr.	Wanda Barnett
$797,995.00	$797,995.00

Pursuant to the operation of § 537.675, the State of Missouri is entitled to its full fifty percent (50%) share of this Final Judgment awarding punitive damages to the above-referenced Plaintiffs. The Court recognizes the position of the Attorney General that it is entitled to fifty percent of the entire punitive damages award plus interest, however, this is contrary to the specific terms of § 537.675 and the Court's ruling follows the precise requirements of that statute.

Accordingly, the Turbomeca defendants are hereby ORDERED by the Court on this 28th day of April, 1998 to satisfy this final judgment in full by tendering in open court unto Plaintiffs and the State of Missouri certified checks upon a

United States FDIC-insured Federal Reserve wire-transfer bank as follows:

> $22,657,073.00 payable to: "Kyong Ju Barnett, Jessie Barnett and Robb and Robb LLC;"
>
> $7,552,356.00 payable to: "Kyong Ju Barnett, As Next Friend for Mia Barnett, and Robb & Robb LLC;"
>
> $5,603,117.00 payable to: "James Barnett, Sr., Wanda Barnett, Slagle, Bernard & Gorman, P.C., and Duke W. Ponick, Jr.;" and
>
> $4,742,199.00 payable to "State of Missouri."

The funds for the minor, Mia Barnett, shall be deposited into the duly-created conservatorship for which full bond has issued.

Upon tender of the checks as heretofore set out, Plaintiffs and their counsel are ordered to execute Satisfactions of Judgment which shall be received and acknowledged by defendants and their counsel in open court.

FURTHER, PLAINTIFFS SHALL HAVE AND RECOVER ALL COURT COSTS.

IT IS ORDERED THAT if defendants do not or are not prepared to satisfy this final judgment in full on this date then Plaintiffs' Motion for Execution of Judgment on Appeal Bond shall be sustained forthwith and Plaintiffs shall have and collect upon that judgment against St. Paul Fire & Marine Insurance Company.

LET EXECUTION ISSUE.

Dated: April 28, 1998

/s/ Lee E. Wells
LEE E. WELLS
CIRCUIT COURT JUDGE
DIVISION 8

/s/Barbara Eager
Barbara Eager, Clerk
Division 8

(2)

FILED
JUL 16 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-2072

In The

Supreme Court of the United States

October Term, 1997

TURBOMECA, S.A., and TURBOMECA ENGINE COMPANY,

Petitioners,

vs.

KYONG JU BARNETT, Individually and as Guardian Ad Litem and Next Friend of JESSIE MORGAN BARNETT and MIA KYONG BARNETT, minor children; JAMES S. BARNETT, SR.; WANDA BARNETT; and STATE OF MISSOURI,

Respondents.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District

BRIEF IN OPPOSITION FOR RESPONDENTS JAMES S. BARNETT, SR. AND WANDA L. BARNETT

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JURISDICTIONAL STATEMENT

Petitioners have invoked the jurisdiction of the Supreme Court under 28 U.S.C. § 1257(a) without advising the Court of the facts and circumstances which demonstrate that there is no actual case or controversy for this Court to resolve. This case is moot for the particular reasons that will be set forth in Point I of this brief.

STATEMENT OF THE CASE

A. The Petitioners and Their Relationship

Petitioner Turbomeca, S.A. ("TSA") and Turbomeca Engine Corp. ("TEC") are closely affiliated corporations. TSA designs, manufacturers, sells and services turboshaft (gas turbine) engines through a worldwide network which includes North America. TEC was the corporate affiliate of TSA that sold, serviced and overhauled Turbomeca engines in the United States. (Ex. 281). Both TSA and TEC are owned by Societe Labinal, a holding company. (Tr. Cocheteux 9-11).

At all material times, TSA exercised *de facto* control over the business operations of TEC as evidenced by the following testimony of Jean Cocheteux, its chief executive officer:

> A. . . . But, in fact, if you look at the operations of TEC, the-the flow of directives comes from Turbomeca France.
>
> Q. All right so Turbomeca France exercises control and direction over the business of Turbomeca Engine Corporation of Texas?
>
> A. Yes.

(Tr. Cocheteux 10).

Both TSA and TEC were covered by the same policy of liability insurance that had liability limits of approximately $1,000,000,000. (App. D - pp. 17a-18a). In a proceeding before the trial court, TSA's and TEC's attorney regarded that sum as a surrogate for the net worth of the two companies for purposes of the Barnett case. (App. E - pp. 19a-21a). The payment of the $40,000,000 judgment in this case and the posting of the supersedeas bond in the sum of $134,000,000,000 to secure payment of the judgment were done under that insurance policy.

B. Relevant Background Facts

James Barnett, Jr., the only son of Respondents James Barnett, Sr. and Wanda Barnett, died on May 27, 1993 as a direct result of the explosive in-flight failure of the Turbomeca engine that powered the air ambulance he was piloting. That helicopter known as Life Flight 2 (N728LF) was operated under a joint venture between two hospitals in Kansas City, Missouri. The patient being transported to the hospital in the helicopter was killed and the other two members of the flight crew were permanently and totally disabled.

The engine failure in Life Flight 2 was caused by a defectively designed part known as TU76. TSA and TEC had known that this part was defective since June, 1986, based on an intensive failure mode and effects analysis conducted by TSA in France known as the "Saviot" report. That analysis proved that the design geometry and metallic composition were defective. The analysis further proved that the failure of the part could occur at any time during the rated use or time between overhaul (TBO) of the whole engine which was at that time 2000 hours. (P.Ex.6). TSA and TEC recognized that these defects presented a serious safety problem because the failure of the part could cause an explosive in-flight engine failure.[1]

1. Based on the analysis, TSA's chief engineer, Alain Calemard, testified they knew that they had "a serious safety problem on our hands" constituting "a rather alarming situation." (Tr. Calemard 441; 443-444).

Instead of re-designing TU76 or adequately and honestly warning consumers of the defects, TSA continued business as usual and for competitive, commercial reasons actually increased the TBO from 2000 to 2500 hours. (Tr. Meliet 160-161; Calemard 91; 481-482). It was undeterred by a series of TU76 induced in-flight failures, one of which resulted in serious ("grave") injuries to at least four persons in a single crash. Before the crash of Life Flight 2 on May 27, 1993, there had been at least seven accidents as a result of TU-76 in-flight failures, several with total destruction of the helicopter.[2]

TSA's corporate attitude concerning TU76 was summarized in the following testimony of Mr. Jean Meliet, world-wide customer support technical manager:

> Q. Now notwithstanding the fact you know you have a serious problem with TU76, you still keep manufacturing Arriel engines with TU76 modifications in them without making changes, isn't that true, in design?
>
> A. Yes.
>
> Q. And you keep manufacturing them and selling them without changing the metal, correct?
>
> A. Yes.
>
> * * *
>
> Q. And that goes out on new aircraft and when people bring their engines back for overhaul, TU76 with this weak metal gets put right back in them, correct?

---

2. Dr. Alan Epstein, the Director of MIT's turbine engine laboratory with experience with military and civilian aircraft, described this as an "enormous number" in the field of aviation. (Tr. 1507).

A. Yes.

* * *

Q. And during that period of time the number of these cracks and the ruptures and the incidents and accidents starts mounting, doesn't it?

A. Yes.

* * *

Q. Nonetheless, the production line keeps rolling and we keep making TU76 modified engines for use in the world, correct?

A. Yes.

Q. Including these United States?

A. Yes.

* * *

Q. Okay so we know a third of these engines with this part in it with a bad metal are coming here to this country, correct?

A. Yes.

(Tr. Meliet 69-70; 73-74). The effects of this admitted serious safety problem mounted to the point that in the same week of the Life Flight 2 crash there were two other serious TU76 in-flight failures in the United States. (Tr. Cocheteux 79).

When Mr. Meliet was asked why TSA made a conscious decision not to disclose the precise nature and seriousness of the dangers of TU76 and its alarming safety history to Turbomeca engine users, he stated that he "did not want to disturb them" with such information because he knew it might affect engine sales. (Tr. Meliet 163-164; 310-313).[3]

Ironically, the same day of the crash of Life Flight 2, TSA completed its second numerical count of TU76 failures and cracks in engines examined in France. (P.Exs.7 and 8). These studies showed a defect rate of approximately 6% for TU76 equipped engines. In the subsequent NTSB and FAA investigation of the Life Flight 2 crash, neither TSA nor TEC disclosed the results of either analysis to the U.S. safety authorities although they had been asked to furnish "all details of any known incidents, accidents or problems and any history of discrepancies discovered at overhaul related to this part of the engine." (P.Ex. 172). Likewise, the "Saviot" report was not disclosed to the U.S. authorities.

The jury hearing the evidence in this case found that TSA and TEC's conduct evidenced a conscious disregard for human safety under appropriate instructions[4] and assessed punitive damages. Those damages were subsequently reduced and

3. No disclosure by any means of the existence of the built-in TU76 defects was ever made. The deceptive and misleading service letters sent out to users simply advised them to listen for any "rubbing noise", a procedure known by TSA and TEC to be wholly ineffective. No in-flight failure had been preceded by any perceptible rubbing noise. Moreover, the defective part was housed in a sealed module and could only be visibly inspected by TSA or TEC at overhaul. No disclosure was made that TU76 broke apart in flight and caused explosive engine shutdowns resulting in several crashes and injuries

4. *See Bennett v. Owens-Corning Fiberglass Corp.*, 896 S.W. 2d 464 (Mo. banc 1995) conforming Missouri instructional practice to the requirements of *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

remitted by the trial court and were further reduced and remitted by the Missouri Court of Appeals, Western District as set forth in its opinion appended to Petitioners' Brief. The Respondents accepted the remittitur ordered by that court.

C. Subsequent Proceedings

On April 28, 1998, the Petitioners, without first requesting a stay or seeking a reduction and continuation of their supersedeas bond, paid the remitted judgment plus interest thereon totaling $40,554,745 in separate checks to the Respondents as allocated by the Court.

As a condition for this payment, Petitioners required all Respondents to execute in open court the appended Acknowledgment of Satisfaction and Waiver of Attorney's Liens. (App. A - pp. 1a-5a; App. B - pp. 6a-11a). By that document, which was prepared and approved by Petitioners' attorneys, the Respondents acknowledged that the "tender of *payment shall forever release and discharge defendants* [TSA and TEC] *from any further obligations in this case* except court costs . . .". (Emphasis added).

After paying the judgment in this case and receiving the foregoing release of all claims and satisfaction of judgment, the Petitioners then filed their new brief in the Supreme Court of Missouri in *Letz v. Turbomeca Engine Corporation, et al.*, No. 80558. In support of that brief they attached the judgment entered in this case on April 28, 1998 and expressly took the position that their payment of the *Barnett* judgment entitled them to an absolute credit against the *Letz* judgment in the sum of $26,500,000 under the provisions of § 510.263.4, R.S. Mo. (*See* Apdx. pp. A-10-12).

SUMMARY OF REASONS FOR DENYING THE WRIT

This case is moot. The underlying cause of action has been extinguished by the execution of the release and satisfaction of judgment appended hereto in which the Respondents released and discharged the Petitioners from any further liability in this case. In recognition of the finality of the release and the satisfaction of judgment in this case and before filing the Petition herein, the Petitioners claimed the benefit of all sums paid in this case as an absolute credit against the punitive damages awarded in a companion case now on appeal to the Supreme Court of Missouri. There is thus no case or controversy remaining to support this Court's jurisdiction under 28 U.S.C. § 1257(a).

Apart from those considerations, there is no novel or legitimate constitutional issue presented in the Petition. The court below made a straightforward analysis of this case under the due process principles set forth recently in *BMW of North America v. Gore*, 517 U.S. 559 (1996), and correctly concluded that the reprehensible and egregious conduct of Petitioners shown of record warranted the imposition of substantial punitive damages under the Missouri wrongful death statute. The Petitioners had full advance notice that their persistent willful and reckless conduct affecting the health and safety of Missouri citizens could subject them to punitive damages when people were killed or injured as a result of that type of conduct. Petitioners' tortious conduct was unlawful in every state in the Union and elsewhere. The payment of the award did not impermissibly affect the financial condition of the Petitioners and in no way was violative of the Excess Fines Clause of the Eighth Amendment.

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO LONGER A CASE OR CONTROVERSY FOR THE SUPREME COURT TO RESOLVE BASED ON THE FOLLOWING GROUNDS:

A. The Execution Of The Sworn Release Discharging Petitioners From All Other Obligations To Respondents For The Wrongful Death Of Their Son And Their Acceptance Of Payment Of The Judgment Make This Action Moot.

The Petitioners did not bring to this Court's attention the appended Acknowledgment of Satisfaction of Judgment and Waiver of Attorney's Liens executed on April 28, 1998 by which the Respondents released their claims against Petitioners. (App. A - pp. 1a-5a) . That release destroys any jurisdiction in this Court. Under settled Missouri law, instigating the execution of a general release from an opposing party without a reservation of rights operates as an estoppel as a matter of law and constitutes a settlement of all claims precluding further judicial action.[5] *Farmer v. Arnold*, 371 S.W. 2d 265, 269 (Mo. 1963) makes the point this way:

> When the plaintiff Farmer paid Arnold $50 for a release, and regardless of whether the release

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5. By executing the general release and accepting payment in full satisfaction of the judgment the Respondents did not simply extinguish their cause of action against the Petitioners. Respondents' acceptance of their allocated portion of the judgment caused them to incur immediate income tax liability for the punitive damage component of that judgment. They clearly have detrimentally relied on the finality created by the general release and payment of the judgment.

> constituted the entire contract, *the release was executed at the instigation of Farmer for his own immediate needs and benefit and he is now estopped* after rendering Arnold all but defenseless *from prosecuting one side of a tort action arising out of a single transaction.*

(Emphasis added).

Similarly, the Supreme Court of Missouri in *Lugena v. Hanna*, 420 S.W. 2d 335, 341 (Mo. 1967), recognized that litigation is ended when a party instigates and accepts a release in his favor whether it be based on grounds of estoppel, waiver, accord and satisfaction or other legal doctrines. Under Missouri law, a release and payment precludes further action between the parties as a matter of law because the cause of action has been extinguished.[6] There is thus no longer a viable or justiciable case or controversy between Petitioners and Respondents to support this Court's jurisdiction. The underlying cause of action has been extinguished at the instigation of the Petitioners. This case is moot.

Petitioners attempt to evade the mootness issue by citing the dicta in *County of Dakota v. Glidden*, 113 U.S. 222, 224

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6. Both *Farmer v. Arnold* and *Lugena v. Hanna*, *supra*, affirmed summary judgments giving full preclusive effects to the releases in those cases. *Lugena v. Hanna* at 341 captures the essence of the effect of the release as follows:

> in the absence of words in the operative part of a general release which indicate an intention to limit or restrict its effect, it must be concluded that the instrument was contemplated and intended to be *a complete settlement of all matters between the parties to the release.*

(Emphasis added).

(1885), stating the general rule that payment of a judgment, standing alone, does not waive the payor's right to appeal. Petitioners' reliance on that case is misplaced in view of the fact that Petitioner's sought and obtained a release and discharge of all of their liability to Respondents *in addition to* paying the judgment.

The Petitioners in this case thus stand on the same footing as the Appellant in *County of Dakota v. Glidden*, *supra*. There the court determined that the parties had effectively settled their dispute which extinguished the cause of action and the judgment based on it. The Court therefore dismissed the appeal as moot when it was brought to its attention that the underlying cause of action was extinguished.

In this case the general release executed by the Respondents constituted a complete settlement of this case under Missouri law. The resulting extinguishment of their cause of action mooted this case. There is thus no case or controversy left for this Court to resolve and the writ should be denied on the authority of *County of Dakota v. Glidden* at 225 and the cases cited therein.[7]

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7. In *County of Dakota v. Glidden* at 224-225 the Court saw through the argument that the appellant had merely paid the judgment to stay an execution and noted: "But what was done was a different thing than that." That is also true in this case.

B. The Case Is Moot Because The Petitioners Have Accepted The Benefit Arising From The Release And Payment Of The Judgment In This Case By Asserting To The Supreme Court Of Missouri In *Letz v. Turbomeca Engine Corporation, et al.*, No. 80558 That They Are Entitled To A $26,500,000 Credit Against The Punitive Damages In That Case Under Section 510.263.4, R.S. Mo.

The Petitioners also did not disclose to this Court that following the execution of the general release and the payment of the judgment, Petitioners on May 6, 1998 filed a new brief in the Supreme Court of Missouri in the *Letz* case asserting as a matter of law that they were entitled to a $26,500,000 credit against the *Letz* judgment under Section 510.263.4, R.S. Mo. by virtue of the payment and satisfaction of the *Barnett* judgment.[8]

The acceptance of the benefits of the finality and satisfaction of the *Barnett* judgment in the *Letz* case has adverse jurisdictional consequences for Petitioners in this case. Dismissal of the writ for certiorari is fully warranted based upon the recognized jurisdictional principle that one who accepts the fruits or benefits of a judgment may not appeal from it. *See Tech Hills II Associates v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 970 (6th Cir. 1993) and the cases cited therein.

Petitioners cannot simultaneously attack the *Barnett* judgment in this Court and rely on it in the Supreme Court of Missouri to be relieved of the $26,500,000 judgment for punitive damages in that case. Petitioners legally bought out and

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8. Petitioners' baseless argument that it is subject to a "double whammy" under Section 510.263.4, R.S. Mo. will be dealt with under Point II.D., below. Suffice it here to point out that Petitioners are seeking the protection and benefit of that statute in *Letz* based on the payment and finality of the *Barnett* judgment.

extinguished the Barnetts' interest in this case so that they could perfect their right to a credit under Section 510.263.4, R.S. Mo. in the *Letz* case with the consequence that the jurisdiction of this Court has been similarly extinguished.

II.

THE PETITIONERS HAVE NOT BEEN DENIED DUE PROCESS AS A RESULT OF THE PUNITIVE DAMAGE JUDGMENT OF $26,500,000.

There are no important due process issues presented in this case nor any Rule 10 considerations present to justify granting a writ of certiorari. The court below expressly applied the Due Process standards recently enunciated by this Court in *BMW of North America v. Gore*, 517 U.S. 559 (1996) and related decisions to an unique, egregious case of tort liability involving a persistent course of wilful conduct occurring over a seven year period. The Missouri Court of Appeals' analysis of the facts under *BMW* overwhelmingly supports the reduced punitive award in this case.

A. Petitioners Knew That Their Tortious Conduct Involving A Conscious Disregard For Human Safety Could Subject Them To Punitive Or Aggravating Circumstances Damages For Causing A Wrongful Death In Missouri.

Stripped to the essentials, the Petitioners argue that as far back as 1986 that they have believed they could get away with what the Missouri Court of Appeals determined was "unparalleled" tortious conduct without suffering significant punitive consequences.[9] They

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9. TU76's were known by Petitioners to break apart in-flight, detonate, stop engines and cause crashes and injuries. The continuing manufacture, sale and servicing for almost seven years of such a known, dangerous product and the active concealment of its dangerous characteristics from users and

(Cont'd)

now claim ignorance of a long line of Missouri cases holding damages for "aggravating circumstances" under Section 537.090, R.S. Mo. are punitive in character.[10] In view of those cases there is no substance to their claim that they had no notice that they could

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(Cont'd)
safety authorities makes this case unique in U.S. product liability experience. In no case has non-disclosure of a serious safety defect been so closely linked to sales. In no case has a deliberate decision been made to substantially increase the risk of product failure and injury by extending the time between overhaul or repair for brutally commercial or competitive reasons. *Cf. BMW of North America v. Gore, supra*, involving no such reckless disregard for the health and safety of others, concealment or improper motives.

10. For at least 100 years before the Life Flight 2 crash it was recognized that punitive or exemplary damages were recoverable under the Missouri wrongful death statute if aggravating circumstances were shown to exist. In *Haehl v. Wabash R. Co.*, 24 S.W. 737, 741 (Mo. 1893) the Supreme Court of Missouri stated:

> It needs no argument to show that under this law, in a proper case, exemplary damages may be given. It has been so held or assumed as a self-evident proposition in every case in which the attention of this Court has been called since the law was first enacted in 1855.

Under this law, damages akin to punitive damages were previously upheld in crashes of aircraft upon the requisite showing of a conscious disregard or reckless indifference to human safety. *Weast v. Festus Flying Serv.*, 680 S.W. 2d 262, 267 (Mo. App. 1984) (removal of an anti-ice pump three weeks before the crash, failure to record the removal and dispatch into potentially icy conditions); *Blum v. Airport Term. Serv., Inc.*, 762 S.W. 2d 67, 74 (Mo. App. 1988) (misfueling of aircraft by use of jet fuel in a piston engine by an employee who was on the job for only one week and received inadequate training). TSA and TEC were thus on notice that isolated acts of misconduct, much less a nearly seven year continuing course of tortious conduct, would subject them to the equivalent of punitive damages when that conduct resulted in a wrongful death in Missouri. Missouri was not a "safe harbor" for Petitioners' reprehensible conduct that directly impacted the health and safety of its citizens.

be subjected to when people were killed in Missouri as a result of a long running course of life-endangering tortious conduct.

Petitioners further equivocally state at page 10 of the brief that TSA "may not even been aware that any of its engines had found their way into Missouri." That is a misstatement of fact. TSA's advertising and promotional brochure used to promote sales in the U.S. (P.Ex. 281) contains a photograph of a helicopter in use as an air ambulance. The identifying number on that helicopter is N728LF. That helicopter was Life Flight 2 shown flying in the State of Missouri.

B. The Petitioners' Long-Term Wilful Conduct Was Not Lawful In Any State In The United States Or Elsewhere And Is Not Shielded By The Due Process Clause.

In an effort to trivialize the effects of their wilful conduct, Petitioners equate their self-described "minimal" tortious behavior with that shown in the *BMW* case. Petitioners suggest that not all states or jurisdictions would regard its life-endangering conduct as illegal or unlawful. Accordingly, they argue that the Missouri courts did not accord them due process by allowing evidence of the world-wide, harmful effects of their centralized decision to keep selling a known defective part common to all engines wherever sold or used in the world. They cite no authority which even remotely suggests that the following conduct is lawful anywhere in the world, much less in France:

1. Continued sale and servicing for almost seven years of a known, defective part that could unpredictably, prematurely, and explosively fail in flight.

2. Continued sale and servicing of such a defective part with knowledge of an increasing rate of failures resulting

in crashes involving serious personal injuries and total destruction of helicopters.

3. Deliberate concealment and failure to warn buyers and users of what Turbomeca management regarded as a "serious safety problem" because such warning might adversely affect sales.

4. Extension of the TBO from 2000 hours to 2500 hours to keep up with their competition with knowledge of the serious TU76 product defect that was literally built into its engines.

5. Deliberate concealment of the true frequency and magnitude of the TU76 produce failures and consequences from U.S. safety authorities after the crash of Life Flight 2.

There is obviously a vast difference between universally condemned tortious conduct that can kill and injure people and the repainting or touch-ups of luxury automobiles. *BMW* cannot reasonably be stretched to shield the reprehensible conduct shown of record in this case. Business decisions taken in the executive offices of TSA with a conscious disregard for human safety had a direct and foreseeable effect on the life of James Barnett, Jr., and the other victims in Life Flight 2. Those corporate decisions resulted in identically caused engine failures, injuries and crashes in the U.S. and elsewhere.

Those corporate decisions produced the only truly unlawful extraterritorial effect in this case, not the punitive damages merited by those decisions.

C. Neither Petitioners' Business Operations Nor Their Finances Have Been Affected By The Punitive Damages Assessed Against Them.

The Petitioners have failed to bring to the Court's attention that both of them were protected by a liability insurance policy with liability limits of approximately $1,000,000,000 for all damages arising out of this case. It is clear from the record below that Petitioners' considered this liability insurance as a component of the net worth of both of the closely related entities. In resisting the production of net worth information by way of discovery, here is what one of their witnesses had to say at a hearing held below at page 37 of the hearing transcript following a request for net worth information.[11] (App. E - p. 21a):

> THE WITNESS: Your Honor, I wonder if we could cut through this if I get information from the broker which shows that the — instead of it being five billion french francs its 4.99 billion, *is there any point in chasing this net worth question around*?

(Emphasis added).

The net worth issue presented on this appeal is, in any event, makeweight.[12] Contrary to Petitioners' brief, the award below has not been "financially ruinous" for them nor have they been put out of business. They were fully protected by

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11. This hearing was applicable in all Life Flight 2 cases based on the case consolidation order for discovery purposes.

12. The concurring opinion in *BMW of North America v. Gore*, *supra* at 591, recognized that consideration of a defendant's wealth or net worth is not necessarily intended to act as a significant constraint on punitive awards in any event.

insurance. The net worth point raised by Petitioners is calculated solely to divert the Court's attention away from the recognized controlling factor in this case — the judicially determined reprehensibility of their conduct under *BMW* in relation to other appropriate factors. (Petitioners' Apdx. pp. A-39-50). The enormity of Petitioners' conduct fully supports the judicially reduced punitive award in this case.

D. There Is No Live Issue In This Case That Petitioners Have Been Subjected To Any Impermissible Cumulative Punishment Based On The *Letz* Case.

As noted above, the Petitioners are in fact seeking the available protection of a statutory credit of $26,500,000 against the punitive damages in the *Letz* judgment by virtue of the payment and satisfaction of the Barnett judgment under the very same Missouri statute they erroneously claim subjects them to "a double whammy", Section 510.263.4, R.S. Mo. Their entitlement to such a statutory credit is now before the Supreme Court of Missouri. The asserted issue of "cumulative punishment" can only arise appropriately in that case; it is a non-issue in this one. They have paid the judgment in this case and taken a release which has extinguished the Respondents' cause of action. If they do not obtain a credit from the Supreme Court of Missouri in the *Letz* case in these circumstances, the asserted issue of "cumulative punishment" will then, but only then, be ripe for a petition to this Court in that case.

III.

THE EXCESS FINES CLAUSE OF THE EIGHTH AMENDMENT DOES NOT APPLY TO CIVIL ACTIONS FOR DAMAGES BROUGHT AND MAINTAINED BY PRIVATE LITIGANTS.

This Court has never applied the Eighth Amendment's Excess Fines Clause to a civil action. There is no compelling reason to do so in a civil action for actual and punitive damages brought by private litigants where due process and fairness is already afforded under the standards articulated in *BMW of North America v. Gore*, *supra*, and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). That is true notwithstanding the fact that a State may be a passive beneficiary of a portion of punitive damages. The Eighth Amendment's Excess Fines Clause should appropriately be reserved for fines levied directly by the Government as punishment for a criminal offense. *See United States v. Bajakajian*, __ U.S. __, 118 S. Ct. 2028 (1998).

The Petitioners implicitly concede the correctness of this analysis by simply re-arguing their due process contentions under this point.

CONCLUSION

For each of the reasons set forth in Respondents James Barnett, Sr. and Wanda Barnett's Brief, this Court should deny the Petition for Writ of Certiorari filed by TSA and TEC.

Respectfully submitted,

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Wanda L. Barnett

APPENDIX

APPENDIX A — ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT AND WAIVER OF ATTORNEY'S LIENS FILED APRIL 28, 1998

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

CASE NO.: CV93-24644

DIVISION 8

KYONG JU BARNETT, et al.,

PLAINTIFFS

V.

LA SOCIÉTÉ ANONYME TURBOMECA FRANCÉ A/K/A TURBOMECA, S.A., et al.,

DEFENDANTS.

ACKNOWLEDGMENT SATISFACTION OF JUDGMENT AND WAIVER OF ATTORNEY'S LIENS

Plaintiffs James Barnett, Sr. and Wanda Barnett, and their attorneys of record, and each of them, pursuant to Supreme Court Rule 74.11, RSMo 511.570 and RSMo 537.675, do hereby acknowledge that the final money judgment entered in their favor against the defendants herein on April 28, 1998, in this matter has been fully and finally satisfied and that no further action in this case is required of defendants for any purpose. Defendants' tender

of payment shall forever release and discharge defendants from any further obligations in this case except payment of court costs as determined in the ordinary course by the office of the Clerk of the Circuit Court of Jackson County, Missouri. Said plaintiffs and their attorneys further state that all liens for attorney's fees and expenses be and hereby are expressly waived in this matter.
APPROVED AND ACKNOWLEDGED:

Dated: 4-28-98 — s/ James S. Barnett, Sr.
James Barnett, Sr.

Dated: 4-28-98 — s/ Wanda L. Barnett
Wanda L. Barnett

Dated: 4-28-98 — s/ Duke Ponick, Jr.
Duke Ponick, Jr.

Dated: 4/28/98 — s/ John J. Williams III
John J. Williams, III for himself and
Slagle Bernard & Gorman, LLC

ATTORNEYS FOR PLAINTIFFS JAMES BARNETT, SR. AND WANDA BARNETT

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared James Barnett, Sr., to me personally known, who being by me duly sworn, did say that he has read the foregoing Acknowledgment of Satisfaction of Judgment and Waiver of Attorney's Liens, that

the facts set forth therein are true and correct and that he has signed the same as his free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

s/ Teresa A. Shell
Notary Public

My Commissions Expires:

[stamp] TERESA A. SHELL
Notary Public — Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000 [stamp]

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 of April, 1998, before me, appeared Wanda Barnett, to me personally known, who being by me duly sworn, did say that she has read the foregoing Acknowledgment of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that she has signed the same as her free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

Appendix A

s/ Teresa A. Shell
Notary Public

My Commission Expires:

[stamp] TERESA A. SHELL
Notary Public — Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000 [stamp]

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared John J. Williams, III, to me personally known, who being by me duly sworn, did say that he has read the foregoing Acknowledgment of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that she has signed the same as his free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

s/ Teresa A. Shell
Notary Public

My Commission Expires:

[stamp] TERESA A. SHELL
Notary Public — Notary Seal
STATE OF MISSOURI
My Commission Expires: April 9, 2000 [stamp]

Appendix A

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Duke Ponick, Jr., to me personally known, who being by me duly sworn, did say that he has read the foregoing Acknowledgment of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that he has signed the same as his free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

s/ Teresa A. Shell
Notary Public

My Commission Expires:

[stamp] TERESA A. SHELL
Notary Public — Notary Seal
Platte County
STATE OF MISSOURI
My Commission Expires: April 9, 2000 [stamp]

APPENDIX B — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS, DATED APRIL 28, 1998

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION 8
HONORABLE LEE E. WELLS, JUDGE

No. CV93-24644

KYONG JU BARNETT, et al.,

Plaintiffs,

vs.

TURBOMECA ENGINE CORPORATION, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

On Tuesday, the 28th day of April, 1998, the above-entitled cause came on regularly for hearing before the honorable Lee E. Wells, Judge of Division 8 of the Sixteenth Judicial Circuit, at Kansas City.

APPEARANCES

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Appendix B

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Kyong Ju, Jesse, and Mia Barnett

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and

Mr. Duke W. Ponick, Jr.
Attorney at Law
1100 Main Street
Kansas City, Missouri 64105
Attorneys for plaintiffs James and Wanda Barnett

Mr. Edward F. Downey
Mr. Douglas E. Nelson
Office of Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102

* * *

[9] Honor, we've now signed and executed and are in the process of notarizing the acknowledgments.

Appendix B

At this time we would like to present to counsel for the defendants a fully executed and signed acknowledgment of satisfaction of judgment and waiver of attorneys' liens signed by Mrs. Barnett on behalf of minor child, Mia Barnett, and myself, and my law partner on behalf of our law firm, Your Honor.

MR. O'DEAR: We acknowledge receipt of this document.

MR ROBB: Also on behalf of Mrs. Kyong Ju Barnett, her son, Jesse Barnett, myself, and my law partner, Anita Robb, for our law firm, we present to counsel for defendant Turbomeca the acknowledgment of satisfaction of judgment and waiver of attorneys' liens, Your Honor.

MR. O'DEAR: Again, we acknowledge receipt of this document as well.

MR. WILLIAMS: If you will, we'll dispense with this ceremony of doing it in this fashion. I think Mr. and Mrs. Barnett are keeping in mind the reason that we're here in the first place was occasioned by the death of their son. They have executed the acknowledgment, and I think we can handle this in the routine fashion as far as exchanging the [10] checks.

THE COURT: You want the acknowledgment on the record of course?

MR. O'DEAR: Yes.

Your Honor, at this time the Turbomeca defendants would tender to Mr. Williams and Mr. Ponick on behalf of their clients, James Barnett, Sr. and Wanda Barnett, a check for $5,603,117, Check No. 2189581.

Appendix B

We also acknowledge on the record the receipt of an acknowledgment of satisfaction of judgment and waiver of attorneys' liens signed by James Barnett, Sr. and Wanda L. Barnett, Duke Ponick, Jr., and John Williams for himself, and Slagle, Bernard & Gorman, L.L.C. Is that correct, Mr. Williams?

MR. WILLIAMS: That's right. It's a professional association but I think we've done all right.

MR. O'DEAR: Your Honor, the last check that we have is to the State of Missouri.

Whoever is going to accept this on behalf of the State of Missouri, could you identify yourself?

MR. NELSON: Douglas E. Nelson for the State of Missouri, Your Honor.

Teresa, if you would be so kind to notarize ours, I would appreciate it.

* * *

[14] THE COURT: Yes.

MR. ROBB: Another administrative matter. We ask counsel for defendant to supply us with a copy of the executed satisfactions of judgment.

MR. O'DEAR: We would be happy to do so, and we'll make copies as soon as the hearing is over.

Appendix B

I would like to say too for the record, I'm presuming everybody is going to go to the bank this afternoon. There shouldn't be any reason why anybody doesn't have the money by this afternoon.

MR. ROBB: On behalf of our client, that's our intention, Your Honor.

MR. WILLIAMS: We are too, but I'm unfamiliar with the banking rules for clearing these checks.

MR. O'DEAR: All right.

MR. ROBB: Your Honor, on behalf of our clients, Kyong Ju, Jesse, and Mia Barnett, we ask this Court to sign the final judgment indicating that there has been satisfaction of that judgment in full, and then release and discharge the defendants other than the payment of court costs as reflected in the document.

THE COURT: Judgment has been executed and the costs will be taken care of by the cost department.

MR. WILLIAMS: Your Honor, if I may, I take it [15] the defendants have approved the form and content of the satisfaction of judgment since you supplied it to is that correct?

MR. O'DEAR: Oh, yes. Yes.

THE COURT: Are you going to file those with the Court?

MR. O'DEAR: Yes.

Appendix B

THE COURT: I want to thank everybody for the cooperation that's been shown in obtaining a final closure on this matter. It's been exceptional and I've appreciated all of the help that was received from all sides, and I'm delighted we're finally able to conclude matter.

Thank you.

We'll be in recess.

(Adjournment.)

APPENDIX C — SUBSTITUTE BRIEF FOR APPELLANTS, FILED MAY 6, 1998

IN THE
SUPREME COURT OF MISSOURI

No. 80558

JODIE A. LETZ, Individually and as Guardian Ad Litem and Next Friend of ERIC DAVID LETZ and CHRISTOPHER SCOTT LETZ, Minor children, and as Representative and Administratrix of the Estate of SHERRY ANN LETZ, Deceased,

Plaintiffs-Respondents,

v.

TURBOMECA ENGINE CORPORATION and TURBOMECA, S.A.,

Defendants-Appellants,

and

ROCKY MOUNTAIN HELICOPTERS, INC.,

Defendant.

Appeal from the Circuit Court of Jackson County,
Division 8
Hon. Lee E. Wells

SUBSTITUTE BRIEF FOR APPELLANTS

Appendix C

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* * *

Following 17 days of trial, the case was submitted to the jury on theories of strict liability, negligence, and failure to warn. Defendants objected to the submission of damages for aggravating circumstances (L.F. 478, 487; Tr. 3015), but the court submitted all theories of recovery and aggravating circumstances on a single verdict form, a practice condemned by this Court just two weeks later in *Bennett v. Owens-Corning Fiberglas Colp.*, 896 S.W.2d 464 (Mo. banc 1995).[2]

---

2. In the *Barnett* case, which was tried after *Bennett*, the same judge submitted compensatory damages separately from aggravating circumstances damages. The total verdict in that case was $175,000,000 for compensatory damages and $175,000,000 for aggravating circumstances damages. On post-trial motions in *Barnett*, the trial court ordered a remittitur to $77.5 million. The Court of Appeals further reduced the judgment to $3,500,000 for compensatory and $26,500,000 for aggravating circumstances. This Court denied transfer in *Barnett* (No. 80559), and the plaintiffs in that case consented to the remittitur. This Court may take judicial notice of the final judgment in that case, which is reproduced in the Addendum to this brief. That judgment has now been satisfied, as the Circuit Court's records reflect.

Appendix C

After plaintiffs and RMH had solemnly stipulated before the jury that the TU-76 was defective (Tr. 911-12), plaintiffs' counsel told the jury in closing not to award any damages against RMH (Tr. 3120). The jury was also asked to assume that decedent had died instantly and not to award any damages for her pain and suffering (Tr. 3109).

* * *

We respectfully urge that the present case, if not reversed, is a textbook candidate for application of the principals underlying the doctrine of remittiur. And if this Court does not order a new trial, defendants are entitled to a credit of $26,500,000 against the punitive component of any surviving judgment under § 510.263.4 RSMo. by reason of the payment of that sum as punitive damages in *Barnett*.

CONCLUSION

For the reasons stated, the judgment of the Circuit Court of Jackson County should be reversed and the case remanded with directions to enter judgment for defendants on the issue of aggravating circumstances and to conduct a new trial on all other issues.

Appendix C

Respectfully submitted,

s/ Thomas C. Welsh
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May 6, 1998

APPENDIX D — EXCERPTS OF DECLARATIONS PAGE FOR LIABILITY INSURANCE POLICY NO. 93/14313 WITH LIABILITY LIMITS PAGE

FAUGERE & JUTHEAU

FAUGERE & JUTHEAU, S.A.
Société Anonyme de Couverage d'Assurance

* * *

NOTE DE COUVERTURE

Nous soussignés, FAUGERE & JUTHEAU S.A. confirmons avoir procèdé au placement des risques défines d'aprés

SOUSCRIPTEUR-ASSURE:	Société LIBINAL 5 Avenue Newton MOTIGNY LE BRETONNEUX — 78000 Agissant lant pour son compte que pour le compte des Sociétés qui loi sont affiliées et/ ou dans lesquelles elle dériendrail des intérès, et notamment: — TURBOMECA — TURBOMECA ENGINE CORPORATION
PERIODE:	12 Mois in effet du ler Janvier 1993 (O heure)
RISQUES GARANTIS:	(a) **PARTIE A: 75 % Partie de 100 %:**

Appendix D

— lère Ligue: 250.000.000 de Francs par occurrence et/ ou par année d'assurance, y compris la contrevaleur de US$ 100 Millions pour le risque d'Arrêt des Vols:

* REUNION AERIENNE/ UAP: 75 % partie de 100%.

Cette Assurance s'exerco suivant les Clauses.
Conditions et Exclusions de la Police
N° 93 14313 énúse par la REUNION AERIENNE

— **Zéine Kugye (Excess):** 4.750.000.000 de Francs par occurrence et/ou par année d'assurance, en complément et/ou après èpuisement de 250.000.000 FF par occurrence et/ou par année d'assurance.

* REUNION AERIENNE/ UAP: 32.50% partie de 100%
* AXA (AVIAFRANCE): 10.00% partie de 100%

APPENDIX E — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS, DATED MAY 3, 1995

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION 8
HONORABLE LEE E. WELLS, JUDGE

CV93-19156

JODIE LETZ, et al.,

Plaintiffs,

vs.

TURBOMECA ENGINE CORPORATION, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

On Wednesday, the 3rd day of May, 1995, the above-entitled cause came on regularly for hearing before the Honorable Lee E. Wells, Judge of Division 8 of the Sixteenth Judicial Circuit, at Kansas City (Jackson County)

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* * *

[36] * * *

THE COURT: I think you should provide them with a net worth statement that is certified by some audit.

THE WITNESS: Your Honor's goal is to get this done expeditiously. I don't know who their auditors are. I wouldn't know how to go about getting that done expeditiously. I don't know who they are. I don't know how to get it expeditiously. It seems the expeditious way of resolving this net worth question is the way that I thought you and I understood one another before and that is if we have an annual report of Labinal which breaks out Turbomeca, S.A. and Turbomeca Engine Corporation, we'll give them the picture or give them a copy of the annual report if we have an extra one around. If we don't, we'll give them a picture of the pertinent portions.

MR. WILLIAMS: If, Your Honor, I may get my [37] two cents worth in. I assume the certified financial statements are a part of the auditing process which I assume applies in Europe as well as here. They have subsidiary balance statements for each of the family of the Labinal companies; and, again, it should be either in their hands or among the work papers of their auditors that have to certify the financial statements of the parent, and I'm confident that it would be in those records.

Appendix E

THE COURT: I would imagine they have that.

THE WITNESS: Your Honor, I wonder if we could cut through this if I get information from the broker which shows that the — instead of it being five billion French francs it's 4.99 billion, is there any point in chasing this net worth question around?

* * *

FILED
JUL 16 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-2072

In The

Supreme Court of the United States

October Term, 1997

TURBOMECA, S.A. and TURBOMECA ENGINE CORPORATION,

Petitioners,

v.

KYONG JU BARNETT, Individually, and as Next Friend of JESSE MORGAN BARNETT, and MIA KYONG BARNETT, Minor Children; WANDA and JAMES S. BARNETT, SR; and STATE OF MISSOURI,

Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 23, 1998

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QUESTIONS PRESENTED

1. DOES THIS COURT HAVE JURISDICTION TO ENTERTAIN A WRIT OF CERTIORARI WHERE THE UNDERLYING CASE OR CONTROVERSY HAS BEEN EXTINGUISHED BY PETITIONERS' VOLUNTARY PAYMENT OF THE JUDGMENT IN FULL IN EXCHANGE FOR A COMPLETE DISCHARGE AND RELEASE OF ALL CLAIMS?

2. IS CERTIORARI WARRANTED TO REVIEW A STATE COURT DECISION WHICH CORRECTLY APPLIED THE SETTLED STANDARDS OF *BMW V. GORE* TO THE FACTS OF THIS CASE AND WHICH FURTHER UNDERTOOK AN INDEPENDENT REVIEW OF THE REASONABLENESS OF THE PUNITIVE DAMAGE AWARD ACCORDING TO MORE STRINGENT STATE LAW STANDARDS?

3. IS CERTIORARI WARRANTED TO DECIDE WHETHER THE EXCESSIVE FINES CLAUSE APPLIES TO PUNITIVE DAMAGES IN CIVIL CASES WHEN NO FEDERAL OR STATE COURT HAS EVER CONSIDERED THE ISSUE AND WHEN EXCESSIVE FINES ANALYSIS WOULD ONLY DUPLICATE THE DUE PROCESS ANALYSIS THOROUGHLY PERFORMED BY THE COURT BELOW?

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STATEMENT OF THE CASE

On May 27, 1993, James Barnett, Jr. was the pilot in command of Life Flight 2, an air ambulance helicopter service operated jointly by St. Luke's and St. Joseph Hospitals in Kansas City, Missouri (Tr. 844-46). He and a crew of two nurses were responding to a call for a hospital transfer in Bethany, Missouri. Upon arrival at the hospital, the patient was loaded onto the helicopter and the helicopter departed for St. Luke's Hospital in Kansas City (Tr. 850-51). Mr. Barnett did not know that his life-saving mission would result in two deaths, his own and that of the patient. He did not know that his helicopter contained a defective part which caused the fatal crash.

Petitioner Turbomeca, S.A.[1] is a helicopter engine manufacturer based in Tarnos, France. Petitioner Turbomeca Engine Corporation is its corporate affiliate that exclusively distributes Turbomeca engines in the United States. Since 1985, petitioners were on notice that the engine part that caused the death of Mr. Barnett and the patient in his helicopter was dangerous and defective. During the 8 years preceding the crash, petitioners deliberately withheld from aviation authorities and users of their helicopter engine warnings as to the danger they knew existed and offers to replace the defective parts. The evidence clearly established that petitioners failed to warn or replace parts because they knew that replacement would cost them in excess of $48 million and they

---

[1] Petitioners have incorrectly named both corporate defendants. As set out in the opinion by the Missouri Court of Appeals the legal name for Turbomeca, S.A. (which is the A/K/A) is La Société Anonyme Turbomeca Francé. Further, the distributor is not Turbomeca Engine Company, but Turbomeca Engine Corporation (Pet. A-1). Except where separately identified, both petitioners will be referred to hereinafter as Turbomeca.

were willing to risk public health and safety to save that expense.

The Missouri Court of Appeals, in a unanimous opinion of its 11 members sitting en banc,[2] accurately summarized the evidence offered at trial as follows:

> The reprehensibility of Turbomeca's conduct is *unparalleled*, considering that Turbomeca knew the TU-76 was defective and had discussed incidents resulting from the TU-76's failure internally, but did not find it necessary to either: inform the helicopter owners of the in-flight failures, notify the FAA of such incidents, or conduct a recall of the defective TU-76 part. From the evidence it can easily be inferred that Turbomeca's decision-making was motivated solely by economics.

Pet. App. A-41 (emphasis added). The court thoroughly set forth the pertinent facts in its opinion at Pet. App. A-1-15 and A-30-50.

The deceased's wife of 15 years, his 14- and 12-year-old children, and his parents brought this action against Turbomeca. Following a four-week trial, the jury entered a verdict of $175 million in punitive damages in addition to compensatory damages. The trial judge ordered a remittitur of all but $25 million of the compensatory damages and of one-half or $87.5 million of the punitive damages. The Missouri Court of Appeals further remitted compensatory damages to $3.5 million and punitive damages to $26.5 million. Petitioners' application for review to the Missouri Supreme Court was denied.

---

[2] Judges on the Missouri Court of Appeals are selected by means of a non-partisan merit commission system known as the "Missouri Plan."

SUMMARY OF REASONS FOR DENYING THE WRIT

The petition suffers from a fatal jurisdictional defect. In exchange for payment of the final judgment in this case, and before filing their petition in this Court, petitioners demanded and received an unconditional release and satisfaction of judgment from respondents. Under Missouri law, this concludes the litigation between the parties and precludes any further judicial action. Petitioners have recognized the finality of this release and satisfaction of judgment by claiming the punitive sums paid in this case as a credit in a companion case now on appeal to the Supreme Court of Missouri. Thus, there is no live case or controversy to support this Court's jurisdiction under 28 U.S.C. 1257(a).

Although the jurisdictional issue is technically primary, the virtual certainty of a jurisdictional defect in this case is just one more reason why this Court should deny a petition that fails on its own merits. The court below upheld a remitted punitive damage award in this case after thoroughly applying the due process standards this Court recently announced in *BMW of North America v. Gore*, 116 S.Ct. 1589 (1996), as well as conducting an independent review under the more stringent Missouri law standards. Petitioners allege no split among lower courts concerning the *BMW v. Gore* standards, nor indeed any erroneous interpretation of those standards by the court below.

Petitioners' claim that this case should still provide the occasion for further elaboration of punitive damages rests on false or misleading statements of law and fact. Petitioners had full advance notice that their persistent intentional and reckless conduct, resulting in the death of two people, could subject them to punitive damages under Missouri law. The punitive award in this case related solely to that conduct, not to conduct in other

jurisdictions. In reviewing that award, the court below fully and correctly considered petitioners' financial condition and the cumulative effect of an award in a companion case.

There is no reason for this Court to consider a novel extension of the Excessive Fines Clause to this case when no lower court has considered this issue and when an Excessive Fines Clause analysis would merely duplicate the due process analysis thoroughly performed by the court below.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION TO ENTERTAIN THE PETITION IN THAT PETITIONERS VOLUNTARILY PAID THE FINAL JUDGMENT IN FULL WITHOUT ANY RESERVATION OF RIGHTS AND IN EXCHANGE FOR RESPONDENTS' COMPLETE RELEASE AND DISCHARGE OF ALL CLAIMS WHICH EXTINGUISHED THE UNDERLYING CAUSE OF ACTION.

This Court lacks jurisdiction to entertain the petition for writ of certiorari because there is no longer any case or controversy between the parties. This is so because petitioners voluntarily paid the entire amount of the punitive judgment in this case without reservation of any rights or remedies and demanded and received a complete release from respondents. The "Acknowledgments of Satisfaction of Judgment and Waivers of Attorneys' Liens" expressly provide that "[D]efendants' tender of payment *shall forever release and discharge defendants from any further obligations in this case.*" Resp. App. 1, 6 (emphasis added). These are general releases which constitute a full accord and satisfaction under Missouri law.

The general release of a defendant without any reservation of rights concludes the litigation for all purposes

and precludes further judicial action. *Lugena v. Hanna*, 420 S.W.2d 335, 341 (Mo. banc. 1967); *Farmer v. Arnold*, 371 S.W.2d 265, 269-70 (Mo. banc. 1963). In the words of the Missouri Supreme Court:

> In the absence of words in the operative part of a general release which indicate an intention to limit or restrict its effect, *it must be concluded that the instrument was contemplated and intended to be a complete settlement of all matters between the parties to the release.*

Lugena v. Hanna, 420 S.W.2d at 341 (emphasis added). This release thoroughly extinguishes any jurisdiction in this Court.

The release documents were drafted by petitioners and make express reference to Mo. Rev. Stat. § 511.570. That statute provides that "[w]hen any judgment or decree is satisfied *otherwise than by execution*," the prevailing party shall enter an acknowledgment of satisfaction. Petitioners' claims of a threat of execution notwithstanding, it is beyond dispute that the monies were voluntarily tendered because no process of execution was ever initiated and the judgment was satisfied, per the statute, "otherwise than by execution."

There was absolutely nothing about this final hearing or the documents executed therein which would indicate that this was anything other than the final resolution of the case. Based upon the transcript of final judgment proceedings, it was abundantly clear that petitioners and respondents were present to obtain and the court below decreed a *"final closure on this matter."* Transcript of Proceedings of Entry of Final Judgment, April 28, 1998, Resp. App. 23 (emphasis added) (hereinafter "Transcript of Final Judgment Proceedings"). Petitioners expressly approved the terms of the final judgment as ordered by the trial court:

> MR. O'DEAR (attorney for petitioners): Judge, on behalf of the Turbomeca defendants, we do acknowledge that this final judgment is in order, which is consistent with the court's rulings on these various matters.

Resp. App. 14. Indeed, petitioners expressly sought the release and discharge agreements by respondents as a condition to their payment of the judgment:

> MR. O'DEAR: Your Honor, at this time we would ask that Mr. Robb and his clients sign the acknowledgments of satisfaction of judgments, which we have provided to them.
>
> MR. ROBB: We agree to do so, Your Honor.
>
> Your Honor, we have now signed and executed and are in the process of notarizing the acknowledgments . . .
>
> MR. O'DEAR: We acknowledge receipt of this document. Resp. App. 18.

These proceedings established unequivocally the consensual nature of the payment in exchange for respondents' complete release of petitioners and its acceptance by all as the final accord and satisfaction of the litigation. At this hearing rendering final judgment and release of all claims, petitioners never stated that they were paying the judgment involuntarily so as to avoid further payment of post-judgment interest or under duress to avoid execution on the appeal bond, as they now claim to this Court. Pet. 8. Any threat of execution on an appeal bond (which the respondents had a legal right to demand and the court had full authority to order) is certainly not the kind of "duress" that would render payment on a judgment involuntary especially where that appeal bond had already been in place for almost three years. It is not "duress" to threaten to do what one has a legal right to do. *Gustin v. F.D.I.C.*, 835 F. Supp. 503, 508 (W.D. Mo. 1993) (applying Missouri law).

To the contrary, petitioners *voluntarily* paid the judgment with the intent that respondents "forever release and discharge" them. Petitioners on their own included the "release and discharge" language in the acknowledgment of satisfaction of judgment documents:

> MR. WILLIAMS (counsel for co-respondents Wanda and James Barnett, Sr.): Your Honor, if I may, I take it the defendants have approved the form and content of the satisfaction of judgment since you supplied it to us, is that correct?
>
> MR. O'DEAR (attorney for petitioners): Oh, yes. Yes. Resp. App. 18.

It is well-settled law not only here but also in Missouri that voluntary payment of a judgment amounts to accord and satisfaction and extinguishes the right to appeal that judgment.[3] *Thorp v. Bonnifield*, 177 U.S. 15,

---

[3] Petitioners' cited case of *Rosenblum v. Jacks Or Better of America West, Inc.*, 745 S.W.2d 754 (Mo. App. 1988), squarely supports respondents' position in holding that *"voluntary payment of a judgment precludes appeal of that judgment."* *Id.* at 763 (emphasis added). There was no "threat of execution" as stated by petitioners as the judgment in that case was not even fully satisfied. Instead, the court noted that "documents appended to appellants' brief clearly reflect that payment of the judgment was made in lieu of posting a supersedeas bond or submitting to execution, and not voluntarily, in a sense that payment was made so as to end the matter." *Id.* at 764. Petitioners in the case at bar already had a bond posted and payment was clearly made to "end the matter" as they took an unrestricted general release from respondents.

Petitioners cite *Cahill v. New York, N.H. & H.R. Co.*, 351 U.S. 183 (1956) for the proposition that payment of a judgment does not necessarily render a case moot. Pet. 8 at n.6. However, in that case, "[p]etitioner was informed that respondent intended to pursue its remedies notwithstanding payment of the judgment," 351 U.S., at 183, a fact upon which the Court specifically relied. *Id.* Also, the Court specifically noted that the

18-19 (1900); *Little v. Bowers*, 134 U.S. 547, 556 (1890); *Leonard v. Pioneer Finance Co.*, 568 S.W.2d 937, 943-44 (Mo. App. 1978) (defendant who makes voluntary payment of judgment "is barred from appealing that judgment"); *Noah v. German Insurance Company*, 78 Mo. App. 370, 373-74 (1898) (payment of final judgment estops both parties from further litigating the case). This is especially so where the general release, discharge, tender of funds, and acknowledgment of satisfaction were all expressly approved by the court. Indeed, the court approved immediate release of the funds to respondents. Resp. App. 21-22. Strong considerations of comity and finality weigh in favor of according preclusive effect to the general release and discharge, as interpreted under Missouri law.

Moreover, petitioners *induced and invited* respondents to negotiate the tendered checks promptly and to make use of the funds immediately:

> MR. O'DEAR (counsel for petitioners): I would like to say too for the record, I am presuming everybody is going to go to the bank this afternoon. *There shouldn't be any reason why anybody doesn't have the money by this afternoon.*
>
> MR. ROBB: *On behalf of our client, that's our intention,* Your Honor.

---

district court denied an application for a stay of execution. Here, petitioners did not reserve any further rights, did not advise respondents of their intention to appeal to the U.S. Supreme Court, and never requested a stay of execution which surely would have been granted given the existence of an adequate appeal bond in the amount of $134 million.

Petitioners' citation of *United States ex rel. H & S Indus., Inc. v. F.D. Rich Co.*, 515 F.2d 760 (7th Cir. 1975), is similarly misplaced because in that case *both* parties "contemplated appealing, and did in fact appeal." *Id.* at 765.

Resp. App. 22-23 (emphasis added). *Both* petitioners and respondents clearly demonstrated an intention and expectation that the funds would be put to immediate use by the respondents. Respondents' acceptance and beneficial use of the judgment monies is based not only on the final judgment of the Missouri court following exhaustion of all appeals, but also on the petitioners' explicit promise that respondents would "have the money by this afternoon." The release and discharge constitutes a contract – to wit, one expressly approved by the court – and petitioners' actions in inducing actual reliance by respondents as to the beneficial use of the monies is a classic instance of estoppel. *Missouri Highway and Transportation Comm. v. Myers*, 785 S.W.2d 70, 73 (Mo. banc. 1990).

Both petitioners and respondents have accepted the finality of the judgment by acting in significant reliance upon the release and final judgment. Petitioners have claimed the benefit of the release by applying for a credit under Missouri law for the $26.5 million paid in punitive damages in *Barnett* in the companion case of *Letz v. Turbomeca, S.A.* pending before the Missouri Supreme Court, Case No. 80558 (Subst. Brf., p. 92).[4] Petitioners cannot accept the advantages of this judgment in the companion case while at the same time seeking to appeal from it.

This Court has long recognized the "acceptance of benefits doctrine" which provides that a party who accepts the benefits of a judgment is precluded from appealing that judgment. *Embry v. Palmer*, 107 U.S. 3, 18-19 (1883); *see also Winfield Inns v. Edward Leroux Group, Inc.*, 896 F.2d 483, 488-89 (11th Cir. 1990) ("acceptance of

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[4] Mo. Rev. Stat. § 510.263.4 provides a credit for "amounts previously paid by the defendant for punitive damages arising out of the same conduct."

benefits" doctrine provides that "a party who voluntarily and knowingly accepts the benefits of a judgment or decree cannot seek a reversal of the judgment or decree on appeal"). Petitioners have liquidated the respondents' actions in the case at bar precisely so they could claim a credit under the Missouri statute in the companion case. Their treatment of this case as fully and finally satisfied renders moot any further appellate action and renders this Court without jurisdiction to hear this writ.

Respondents have detrimentally relied on the final judgment and petitioners' representations in several respects. Respondents have incurred substantial tax liabilities and other fees and expenses incurred with acceptance of the final judgment in full reliance on petitioners' representations. Resp. App. 1, 6. In further reliance, as part of the final judgment and with the full knowledge and consent of petitioners, respondents extinguished and paid the claims of the State of Missouri for one-half of the net punitive judgment, a sum of $4,742,199.[5] Pet. App. 40. Petitioners have no recourse under Missouri law for recovery of these funds in that they were tendered and paid for pursuant to the court order with full and lawful consideration, i.e., release and discharge of all claims against petitioners.

Accordingly, the full payment of the judgment and the general release executed as between petitioners and respondents in the lower court effectively extinguish any jurisdiction of this Court. As the Court lacks jurisdiction under 28 U.S.C. § 1257, the petition should be denied.

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[5] Indeed, petitioners *directly* tendered the payment of $4,742,199 to the State of Missouri "in full and final satisfaction of any interest the State has or may have in this matter." Resp. App. 21.

II. ONCE PETITIONERS' MISSTATEMENTS OF MISSOURI LAW AND OF FACT ARE CORRECTED, THIS CASE PROVIDES NO REASON TO ELABORATE FURTHER DUE PROCESS CLAUSE LIMITATIONS ON PUNITIVE DAMAGE AWARDS.

Petitioners do not claim that the court below articulated an interpretation of the standards announced by this Court in *BMW v. Gore*, 116 S.Ct. 1589 (1996), that conflicts with the interpretation of any other federal or state court. Nor do petitioners claim that the court below articulated an interpretation of the *BMW* standards that conflicts with any particular language in *BMW* itself.

Rather, petitioners' only claim is that the *BMW v. Gore* standards are themselves insufficient to the extent that they allow a punitive damage award to stand on petitioners' slanted version of the law and facts of this case. Petitioners do not propose any particular elaboration of those standards that they think would be helpful and warranted. Instead, they merely suggest that this Court, with no help from petitioners, might want to provide "[s]ome further guidance," Pet. at 14, and "explain when enough is enough." *Id.* at 16.

Most importantly, however, many of petitioners' statements about Missouri law and the facts of this case are patently erroneous or misleading. Contrary to petitioners' misstatements, Missouri law has provided clear notice for over a century that punitive damages are available in a wrongful death action; the punitive damages liability imposed on petitioners related solely to the deaths their actions caused in Missouri, not to extraterritorial damage as petitioners claim here; the lower court's treatment of petitioners' financial status was fully in accord with this Court's guidelines and did not conflict with other lower court treatments; and in determining the

appropriateness of the punitive damage award to respondents, the court below fully considered the cumulative effect of that award and the award of punitive damages in *Letz v. Turbomeca Engine Corp. et al.*, the other wrongful death action arising from the same accident that killed Mr. Barnett.

Once Missouri law and the facts are set straight, it is clear that this case provides no reason for this Court to provide any further elaboration on *BMW v. Gore*, given the complete absence of lower court conflict or alleged error in application, and despite petitioners' vague calls for clarification.

It is highly significant that petitioners present no issue here as to the due process adequacy of Missouri's *procedural* safeguards on punitive damage awards. Petitioners have never in this case challenged any of Missouri's procedural safeguards as violating due process, as so found by the Missouri Court of Appeals:

> Because Turbomeca does not argue on appeal that Missouri's standards and controls are so inadequate as to violate due process, this issue is outside the scope of this opinion.

Pet. App. A-38 n.12. Indeed, Missouri's procedural safeguards on excessive punitive awards substantially exceed what this Court has determined to be minimal due process. These protections include bifurcation of the compensatory and punitive findings, clear instructions to the jury patterned after *Haslip* as to the function of punitive damages "to punish and deter defendants," inadmissibility of defendants' financial data until finding of punitive liability, trial and appellate court authority to remit punitive awards, and more. Mo. Rev. Stat. § 510.263. Each and every one of the foregoing safeguards was requested by and afforded petitioners in this case.

Given the propriety of the Missouri procedures on assessment of punitive damages, respondents respectfully submit that the remitted punitive judgment therefore "is entitled to a strong presumption of validity" as pronounced by this Court in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993); *see also BMW v. Gore*, 116 S.Ct. at 1604 (Breyer, J., concurring). Petitioners' sole mission is to re-argue the evidence and to engage this Court in a factbound determination of the reasonableness of the final punitive judgment in this case. Therein lies no claim to the review process of this Court.

A. The Missouri Appellate Court Properly Followed The Due Process Guidelines Set Forth In *BMW v. Gore* As Well As The More Stringent Missouri Law Standards.

The Missouri Court of Appeals, in its unanimous (11-0) opinion, not only reviewed the punitive damage award to assure that it complied with this Court's decision in *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996), but also to assure that the amount met the additional strict standards of Missouri law. *See* Pet. App. A-39-50. The court gave extended consideration to each of the three *BMW v. Gore* factors. First, it examined the reprehensibility of petitioners' conduct and, after a detailed analysis, concluded that:

> [G]iven the testimony of Turbomeca's own officers, it is not difficult to understand why a large punitive damage amount was awarded. *Turbomeca's conduct was unquestionably reprehensible.*"

Pet. App. A-47 (emphasis added).

Second, the Court of Appeals examined the ratio of compensatory and punitive damages and observed that "[t]he trial court's remittitur of $87.5 million in punitive damages, and to $25 million in compensatory damages

exhibits a ratio of just over 3:1," and "the trial court's remittitur evinces a 'reasonable relationship' between actual and punitive damages given the nature of Turbomeca's conduct." Pet. App. A-47 (citing *BMW*, 116 S.Ct. at 1601).

Third, the Court of Appeals examined how the punitive damage award compared to penalties authorized or imposed in comparable cases and concluded that the punitive damage award "was the only real way to deter the conduct of Turbomeca" which based its decisions solely on economics and in complete disregard to whether persons would be injured or killed.[6] Pet. App. A-48.

After considering the factors enunciated by this Court in *BMW v. Gore* as relevant to federal due process

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[6] Petitioners' highest corporate executives admitted that the reason they did not inform world-wide operators or civil aviation authorities of their defective engine part was to save the cost of recall and to not disturb sales (Nichols 56-57; Meliet 162-64). A recall and retrofit of the defective helicopter engine part would have been solely at petitioners' cost and in 1991 that cost would have been in excess of $48 million (Nichols 61-62, Tr. 1151, 1112-13). According to the Missouri court:

> The company always seemed to be motivated by cutting costs, saving money and increasing sales – all at the expense of the unlucky owners. The TU 76 was modified to save money. The new and replacement parts took longer to implement for some customers than to build the entire original engine because of "being blocked" by its commercial sales department. Its laissez faire attitude of never notifying, even post-*Letz* and *Barnett*, owners of the lethal, undetectable dangers inherent in the modified TU 76, along with its net worth and financial ability justifies the imposition here of substantial punitive damages.

Pet. A-49.

analysis, the Court of Appeals went on to fully examine eight additional factors that further constrain punitive damage awards under Missouri law, including "(1) the degree of malice or outrageousness of the defendant's conduct; (2) aggravating and mitigating circumstances; (3) the defendant's financial status; (4) the character of both parties; (5) the injury suffered; (6) the defendant's standing or intelligence; (7) the age of the injured party; and (8) the relationship between the two parties." Pet. App. A-48. In the end, the Court of Appeals further remitted the punitive award to $26.5 million and concluded that that sum was reasonable in that it was necessary and sufficient to punish petitioners. *Id.* at A-47-50.

Thus, unlike the Alabama courts in *BMW v. Gore*, the lower courts in this case did not apply standards that were "vague and open-ended to the point where they risk[ed] arbitrary results." *BMW v. Gore*, 116 S.Ct. at 1605 (Breyer, J., concurring). Rather, they diligently applied the standards that this Court formulated in *BMW*, as well as the additional Missouri safeguards. Because the *BMW* Court understandably declined to "draw a bright line marking the limits of a constitutionally acceptable punitive damages award," *BMW v. Gore*, 116 S.Ct. at 1604, the lower courts here did all that they could possibly do to protect petitioners' due process rights.

B. Missouri Law Has Provided Clear Notice For Decades That Punitive Damages Are Available In Wrongful Death Cases.

Petitioners' claim that Missouri law did not adequately notify them of their potential liability for punitive damages is ludicrous. The statutory language authorizing the award of punitive damages in this case – a provision specifying that, in determining an award of damages that

are fair and just in a wrongful death case, "[t]he mitigating and aggravating circumstances attending the death may be considered" – has remained unchanged since 1855, 138 years before petitioners' conduct caused Mr. Barnett's death. *See* Mo. Rev. Stat. § 537.090 (1994) (current provision); Mo. Rev. Stat. Ch. 51, § 4 (1855) (allowing for a jury to award "damages as they may deem fair and just, . . . and, also, having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default").

Petitioners' chief grievance seems to be that this provision does not contain the specific term "punitive damages." Yet since at least 1883, 110 years before Mr. Barnett's death, the Missouri Supreme Court has made clear that when "aggravating circumstances" are present, "fair and just damages" may include exemplary or punitive damages. *See Nichols v. Winfrey*, 79 Mo. 544, 552 (1883) ("[I]f the circumstances are of an aggravating character, the jury [is] not held to the mere pecuniary injury, but may give punitive damages"). Missouri courts have never wavered in this interpretation over the intervening period of more than a century. *See, e.g., Parsons v. Missouri Pac. Ry. Co.*, 6 S.W. 464, 468 (Mo. 1888); *Goode v. Central Coal & Coke Co.*, 151 S.W. 508, 511 (Mo. App. 1912) (holding that the words "mitigating or aggravating circumstances" found in the wrongful death statute "are intended to apply only to cases in which it would be proper to allow punitive damages").

In light of the unbroken 110-year line of Missouri precedent interpreting the Missouri wrongful death statute to authorize punitive damage awards, there is not the slightest truth to petitioners' assertion that a "diligen[t] examin[ation of] Missouri statutory and case law" would leave it with "no conceivable reason to think" that it

could face punitive damages.[7] Pet. 10-11. Thus, the Court of Appeals was fully justified in concluding that "it could not reasonably be said that Turbomeca did not have adequate 'notice' of the severity of the sanction that might befall them as a result of their conduct. The aforementioned testimony reveals this fact." Pet. App. 48.

Petitioners artfully insinuate that the Missouri Supreme Court's decision in *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. 1995), issued two years after the accident that gave rise to this action, was the first to hold that the "aggravating circumstances" language authorized punitive damage awards. Pet. 9-10.

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[7] Petitioners also intimate that they did not have proper notice of the particular *amount* of punitive damages that might be assessed against them, since no previous award of punitive damages in Missouri had been as large. Pet. 10. The criterion for punitive damage awards implied in this objection – that no award can ever be larger than the largest previous award in the state – is obviously ridiculous and has no basis in this Court's precedent. In *BMW of North America*, this Court held that three factors were relevant to determining whether a defendant had "adequate notice of the magnitude of the sanction that [the state] might impose" for violating state law: "the degree of reprehensibility" of the conduct; "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award"; and "the difference between [the award] and the civil penalties authorized or imposed in comparable cases." *BMW of North America*, 116 S.Ct. at 1598. To the extent that any of these factors involve comparison with previous awards in the same jurisdiction, they require comparison, not of raw amounts of awards, but of the degrees of reprehensibility, disparities from harm or potential harm, and relation to civil penalties in previous cases. Because petitioners make no attempt to go beyond the raw numbers in previous cases, their citation of those cases sheds no light on the issue whether they had adequate notice of the severity of punitive damages to which their egregious conduct might expose them.

In fact, however, *Bennett* expanded defendants' rights in Missouri wrongful death actions, rather than expanding a defendant's liability for punitive damages.

In *Bennett*, a wrongful death *plaintiff* argued that a jury's award of damages for "aggravating circumstances" did not always amount to punitive damages and, therefore, did not always have to pass the same exacting review as a punitive damage award. The *Bennett* court rejected this contention, concluding that defendants should receive the benefit of punitive damage procedures and review whenever a jury based a damage award on "aggravating circumstances." *Bennett*, 896 S.W.2d at 466.

Importantly, *Bennett* afforded Missouri wrongful death defendants not only due process review under federal law, but also additional protection under state law. Petitioners omitted mention of these protections in their petition, notwithstanding the fact that they deliberately chose to avail themselves of those protections in the lower courts. Section 510.263 (1) of Missouri Revised Statutes (1994), provides that "[a]ll actions tried before a jury involving punitive damages shall be conducted in a bifurcated trial before the same jury if requested by any party." In this case, petitioners invoked the protection of this bifurcation provision. In doing so, they obtained the benefit of a companion provision, which provides that "[e]vidence of defendant's financial condition shall not be admissible in the first stage of such trial unless admissible for a proper purpose other than the amount of the punitive damages." Mo. Rev. Stat. § 510.263 (2) (1994).

Thus, petitioners took full advantage of *Bennett* to protect themselves against any prejudice that might arise from admission of evidence of the defendant's financial condition when liability and compensatory damages are litigated, even though it has never been held that such protections are required by due process. It is therefore

particularly ironic that petitioners now misleadingly portray *Bennett* as the first case that could have notified them that their conduct might subject them to punitive damages liability.

C. The Punitive Liability Imposed Upon Petitioners Was Related Solely To The Deaths That Occurred In Missouri.

Petitioners contend that the punitive damage award in this case was based in part on their conduct with regard to other helicopter engines in other jurisdictions, seeking to gain protection under this Court's pronouncement that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."[8] *BMW of North America v. Gore*, 116 S.Ct. at 1597. Although no State countenances the deliberate marketing of dangerous machines, no effort was made in this case to punish petitioners for conduct, whether lawful or unlawful, in other jurisdictions.

The proof was directed at showing that petitioners' failure to warn the deceased and to replace a part that

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[8] Unlike the petitioner in *BMW of North America*, petitioners here have made no attempt to show that their conduct was indeed lawful in other states or countries. They thus ask this Court to elaborate on its holding in *BMW of North America* without knowing whether petitioners' conduct was lawful in some other jurisdiction, as in *BMW of North America* itself, or unlawful, thus raising a question that *BMW of North America* expressly reserved. *See BMW of North America*, 116 S.Ct. at 1598 n. 20 ("Given that the verdict was based in part on out-of-state conduct that was lawful where it occurred, we need not consider whether one State may properly attempt to change a tortfeasors' unlawful conduct in another State."). This void in the record leaves this Court without the means of deciding whether the question is even present on the facts of this case.

they knew was defective was not only intentional, but also was the result of a deliberate process in which petitioners decided to save $48 million rather than inform the users of their product that their lives were in danger. This use of "evidence describing out-of-state transactions" is precisely the use that the Supreme Court has deemed "relevant to the determination of the degree of reprehensibility of the defendant's conduct," *BMW v. Gore*, 116 S.Ct. at 1598 n. 21, and therefore perfectly admissible and consistent with due process. *Id.* at 1599-1600; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 n. 28 (1993).

Thus, respondents introduced considerable evidence at trial that the helicopter engine part that caused the death in this case had failed again and again both outside the United States and inside the United States. The number of incidents putting petitioners on notice of the danger that persisted as a result of their failure to warn or replace the defective part is set out thoroughly by the Missouri Court of Appeals. *See* Pet. App. A-7-15.

Both the jury instructions at trial and the Court of Appeals' analysis on appeal are plainly directed at the use of "other incidents" evidence deemed relevant and constitutionally permissible in *BMW v. Gore*. The trial judge in this case instructed the jury that, to award punitive or exemplary damages, it had to find that petitioners' actions "showed a complete indifference to or a conscious disregard for the safety of others." *See* Pet. App. A-17. In reviewing the punitive damage award, the Court of Appeals specifically held that "the amount of the punitive damage award must somehow be related to the wrongful act and the actual or potential injury resulting therefrom." *See* Pet. App. A-37. Thus, it is clear that the jury was asked to examine petitioners' conduct as it related to the facts of this case, and the Missouri Court of

Appeals examined the punitive damage award in light of the wrongful act in this case and the actual or potential injury at stake in this case.

Petitioners were free to argue to the jury, if they chose, that they did not foresee that their helicopter would crash in Missouri or would cause death in Missouri, and that they only foresaw that the defective part they left in their machines was threat to the rest of the world. They made no such argument because it would have been absurd. The question was whether petitioners deliberately put the deceased at risk of death and whether they did so reprehensibly. Given the evidence in this case, the jury reasonably decided to impose constitutionally permissible punitive damages.

Petitioners' claim of extraterritorial punishment is not only baseless, but it also has not been preserved for review in this Court. The evidence in this case clearly established that there were 2,850 helicopters of the type at issue in this case operating worldwide and that one-third of these were in use in the United States. *See* Pet. App. A-42. Petitioners had a full opportunity to offer evidence, if they chose, on the locations of these helicopters, since they sold and maintained them. They offered no such evidence. Nor did they make any argument in the lower courts that the award amounted to punishment for conduct in other states.[9] "[O]rdinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Petitioners make no attempt to explain why this case justifies

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[9] In their motions for remittitur, both petitioners failed to preserve any claim whatsoever that the punitive award was excessive under federal Due Process because of "extraterritorial punishment." (L.F. 692-700). They made only a passing reference to such a claim in their alternative motion for new trial, which is not at issue on their petition.

the extraordinary step of entertaining a question they failed to raise in the Missouri courts below.

D. The Missouri Appellate Court Properly Considered Evidence Of Financial Condition On The Amount Of Damages Needed To Punish And Deter Petitioners' Unlawful Conduct And Petitioners' Argument About Net Worth Is Incomplete As Well As Misleading.

Petitioners argue that the punitive damage award in this case violates due process because it is large in relation to petitioners' respective net worths. Petitioners' claim that the remitted punitive judgment represents 750% of Turbomeca Engine Corporations' net worth. *See* Pet. 13. This claim must be completely disregarded because there was absolutely no evidence offered or admitted at trial as to the net worth or any other financial condition of Turbomeca Engine, the wholly-owned Texas subsidiary. Turbomeca so admitted on the record:

> MR. GHERTNER (trial counsel for Turbomeca): Your Honor, there was no proof of net worth with respect to Turbomeca Engine Corporation.

(Tr. 2788). Thus, respondents have never had any opportunity to analyze or contest the figure petitioners now allege in their petition, nor to consider the appropriateness of isolating Turbomeca Engine's net worth in light of the corporate relationship between the two companies.

On this point, the Missouri Court of Appeals found that Turbomeca Engine Corporation was a wholly-owned subsidiary of Turbomeca, S.A. *See* Pet. App. A-2. Petitioners represent to this Court that they are both indirect subsidiaries of Labinal, S.A., a French corporation. *See* Pet. 1. Notwithstanding their formal corporate relationship, the Chief Executive Officer of Turbomeca, S.A., Jean Bernard Cocheteux, testified that it exercised control and

direction over Turbomeca Engine Corporation. Cocheteux 10. Given Turbomeca Engine Corporation's complete lack of independence from Turbomeca, S.A., it is inappropriate to isolate Turbomeca Engine's net worth – whatever it actually is – for purposes of punitive damage analysis. Thus, petitioners' proffered net worth for Turbomeca Engine Corporation provides a particularly bad factual basis for any inquiry this Court might desire to conduct on the relevance of the net worth/punitive damage award ratio to due process limitations.

Petitioners' repeated claim that the remitted punitive award represents "22% of TSA's net worth" is false and misleading as demonstrated by the record below. Petitioners misconstrue the financial data, and, otherwise, claim poverty with respect to the French parent corporation, Turbomeca, S.A. Respondents introduced extensive evidence at trial of the complete financial condition of TSA (Tr. 2769-2772). Turbomeca, S.A.'s total combined sales for the two years preceding the crash were in excess of $973 million (Tr. 2769-70). The remitted punitive award represents less than 2.7% of this total. Turbomeca, S.A. also had on hand over $710 million in assets (Tr. 2770) of which the remitted punitive award represents 3.7%. In discussing that evidence, the Missouri Court of Appeals pointed out that Turbomeca's *"net worth and financial condition justifies the imposition here of substantial punitive damages."* Pet. App. 49 (emphasis added).

Petitioners' repeated argument that the remitted punitive award would be "financially ruinous" is absurd given that the judgment already has been paid in full, Turbomeca continues as a thriving world-wide business, and payment was made pursuant to a $1 billion insurance policy where the carriers expressly agreed to cover all punitive damages (Tr. 3202-29). At a post-verdict hearing,

petitioners boasted to the trial judge that they had applicable and sufficient insurance coverage applying to all TU 76 incidents in the United States and world-wide in the total amount of $1 billion and that punitive damages would be covered (Tr. 3265-69).

Under this Court's formulation in *BMW v. Gore*, the ultimate test of a punitive damages award is whether it is " 'grossly excessive' " in relation to "the State's legitimate interests in punishment and deterrence." *BMW*, 116 S.Ct. at 1595. Whether a particular award of punitive damages will properly punish a defendant's unlawful conduct, and deter it from future misconduct, necessarily depends in part on the defendant's financial condition; an award that ruins an impoverished defendant may neither chasten nor reform a defendant who has profited handsomely from its wrongdoing. Thus, this Court has held that "the 'financial position' of the defendant" is one of the factors properly considered in determining the validity of a punitive damages award. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 21-22 (1991).

The court below properly considered the net worth of petitioner Turbomeca, S.A. as part of its inquiry into that company's "financial position." The evidence introduced in this case, but conspicuously omitted from the petition, illustrates exactly why no court has or should consider a net worth figure conclusive of a business organization's financial position. The jury had before it conflicting evidence of Turbomeca, S.A.'s net worth – petitioners' self-serving reports suggesting a figure of $122,565,470, and respondents' evidence showing a net worth almost 75% larger. While the petitioners' failure to mention the larger figure shows their willingness to engage in distortion in their petition in this Court, the disparity between the two figures shows why net worth will never provide a simple, complete picture of a business organization's financial

position. Valuation of the assets and liabilities of an ongoing business is never an easy matter, and interested parties can produce widely varying yet nonfalsifiable valuations.

In view of the other relevant information the Missouri appellate court had about petitioners' financial position – information omitted from petitioners' discussion here but fully considered below – it is not hard to understand why the lower court found the punitive damage award as ultimately remitted to be reasonable. Once one recognizes the folly of petitioners' implicit suggestion that their contested net worth figure be given some talismanic significance in a due process inquiry, it becomes apparent that the facts in this case do not provide any reason for this Court to elaborate on the factor of the defendant's "financial position," which is as it stands a perfectly sufficient component of the due process analysis.[10]

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[10] Petitioners hint that the lower court's approval of the punitive award in this case places it in conflict with the Eighth Circuit's decision in *Equal Employment Opportunity Comm'n v. HBE Corp.*, 135 F.3d 543, 557 (8th Cir. 1998), which they describe as holding that "a punitive assessment of five percent of the defendant's net worth is *per se* excessive." Pet. 13. In fact, the court in *HBE Corp.*, applying Missouri law on remittiturs rather than federal due process law, made no such holding, but merely concluded that upon consideration of all of the factors deemed relevant under Missouri law, including "the nature and extent of the misconduct, the impact on the individual plaintiffs, a reasonable relation between the compensatory and punitive damages, and an amount sufficient to punish and deter under all the circumstances," *id.*, a remittitur was warranted. Thus, *HBE Corp.* creates no conflict of federal law, and, indeed, no conflict at all.

E. The Missouri Appellate Court Thoroughly Considered the Cumulative Impact Of A Separate Punitive Award In A Companion Case Arising From The Same Incident

Petitioners also argue that the Court of Appeals imposed an unfair "cumulative punishment" by upholding an identical punitive damage award in a companion case arising out of the same incident. Pet. 14-16. However, the Court of Appeals carefully considered this issue and applied existing Missouri law which holds that " '[i]t is a desideratum of the statute that a defendant not be required to pay redundant punitive damages based on the same conduct.' " Pet. App. A-52 (quoting *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 231 (Mo. App. 1988)). The statute that the court refers to is Mo. Rev. Stat. § 510.263.4 (1994), which provides for a credit of amounts previously paid by the defendant for punitive damages arising out of the same conduct.

Applying this principle of Missouri law to both this case and its companion, the Court of Appeals concluded that:

> [T]he remitted amounts of punitive damages in *each* case, when combined, reach the proper result and supply the relief that the credit statute envisions and the United States Supreme Court has enunciated: that total punitive damages, where there are successive suits, will not go beyond due process limits on punishment and deterrence.

Pet. App. A-53 (emphasis in original).

Thus, the Missouri Court of Appeals carefully examined the total sum of the punitive awards in the two cases and applied both the Due Process analysis of *BMW* as well as the additional protections afforded by Missouri statutory and case law in upholding the remitted award in this case.

III. THERE IS NO REASON TO CONSIDER A NOVEL APPLICATION OF THE EXCESSIVE FINES CLAUSE TO PUNITIVE DAMAGES IN CIVIL CASES WHEN NO OTHER FEDERAL OR STATE COURT HAS CONSIDERED THE ISSUE AND WHEN EXCESSIVE FINES ANALYSIS WOULD ONLY DUPLICATE THE DUE PROCESS ANALYSIS THOROUGHLY PERFORMED BY THE COURT BELOW.

Petitioners issue another vague and open-ended invitation to this Court to "address the Eighth Amendment implications of the State's participation" in the punitive damages awarded to respondents. Pet. 19. Petitioners do not identify a single case that has ever decided whether the Excessive Fines Clause, U.S. Const. amend. VIII, limits a state's share in punitive damage awards in private litigation. More important, petitioners concede that the court below did not address the issue. Pet. 17-19. Thus, petitioners ask this Court to venture into completely uncharted territory.

There is no good reason for this Court to take the extraordinary step of addressing the Excessive Fines Clause issue without the benefit of consideration by any lower court. Petitioners hang their request on the thin thread of a reservation in this Court's ruling in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989), that the Excessive Fines Clause does *not* generally apply to "awards of punitive damages in cases between private parties." The *Browning-Ferris Industries* Court noted that its ruling was circumscribed by the facts of the case before it, in which "the government neither ha[d] prosecuted the action nor ha[d] any right to receive a share of the damages awarded." *Id.* at 264. Petitioners seize on the second half of this limiting language, and contend that the facts of this case afford this Court an opportunity to address the application of the Excessive

Fines Clause when the state does have a "right to receive a share of the damages awarded."[11]

However important this reserved issue might have been immediately after the decision in *Browning-Ferris Industries* – and the absence of a single citation in petitioner's petition to a lower court decision on the issue casts serious doubt even on its initial importance – that importance has vanished since this Court's landmark ruling in *BMW v. Gore*, 116 S.Ct. 1589 (1996), that *all* punitive damage awards are subject to scrutiny for excessiveness under the Due Process Clause. It is no longer in doubt, as it would have been immediately after *Browning-Ferris Industries*, that the size of the punitive damage award in this case is subject to federal constitutional limitations. The court below thoroughly reviewed the award in this case in light of the standards announced by this Court in *BMW*, as well as eight additional standards under Missouri law. *See* Pet. App. A-36-48.

Petitioners nowhere suggest that a court's analysis of a punitive damage award under the Excessive Fines Clause would be the slightest bit different than the Due

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[11] Petitioners do not claim that the state was involved in any way in the prosecution of this action, and indeed it was not; the state's participation in the punitive damage award comes solely by virtue of a general law providing that "[f]ifty percent of any final judgment awarding punitive damages after the deduction of attorneys' fees and expenses shall be deemed entered in favor of the State of Missouri." Mo. Rev. Stat. § 537.675.2 (1994). Under this law, the State is not a party to the trial proceedings. It did not appear or participate in the trial. The jury that awarded punitive damages did not purport to award anything to the State. Thus, the amount of punitive damages awarded by the jury was unaffected by the fact that, after punitive damages are awarded in Missouri, a portion may go to the State.

Process Clause analysis announced in *BMW* and painstakingly implemented by the court below. To the contrary, there is good reason to think that the two analyses would be duplicative. In *United States v. Bajakajian*, 118 S.Ct. 2028, 2036 (1998), this Court announced that a punitive forfeiture would "violat[e] the Excessive Fines Clause if it [were] grossly disproportional to the gravity of the defendant's offense."

Under the Due Process Clause analysis in *BMW*, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of a defendant's conduct." *BMW*, 116 S.Ct. at 1599. The *BMW* Court noted with approval a formulation even more strikingly similar to the Excessive Fines Clause standard this Court recently announced in *Bajakajian*, noting that both the plurality and the dissent in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), "placed special emphasis on the principle that punitive damages may not be 'grossly out of proportion to the severity of the offense.' " *BMW of North America*, 116 S.Ct. at 1599 (quoting *TXO Productions Corp.*, 509 U.S. at 453 (plurality opinion); *id.* at 482 (O'Connor, J, dissenting)).

In sum, petitioners ask this Court to take the extraordinary step of extending the Excessive Fines Clause to reach punitive damage awards in civil cases and elaborating the proper Excessive Fines analysis in that context before any lower court has considered the issue, yet they do not suggest how such a novel analysis would add anything to the Due Process analysis thoroughly applied by the court below in this case. There is no good reason to accept such an invitation, and every reason to decline it.

CONCLUSION

Petitioners' voluntary payment and simultaneous execution of an unrestricted general release extinguishes any jurisdiction in this Court. Both petitioners and respondents have relied upon the release in subsequent actions.

The merits of the writ provide no basis for review in that petitioners can cite to no conflict among the lower courts on any important issue of federal law, and the lower Missouri court properly applied *BMW v. Gore* in substantially remitting the punitive award. The petition for certiorari should be denied.

Respectfully submitted,

GARY C. ROBB* #29618
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Attorneys for Respondents Kyong Ju Barnett, Jesse Morgan Barnett and Mia Kyong Barnett

Counsel of Record

July 23, 1998

APPENDICES

APPENDIX A

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

KYONG JU BARNETT, et al., PLAINTIFFS v. LA SOCIÉTÉ ANONYME TURBOMECA FRANCÉ A/K/A TURBOMECA, S.A., et al., DEFENDANTS.	CASE NO.: CV93-24644 DIVISON: 8

ACKNOWLEDGEMENT OF SATISFACTION OF JUDGMENT AND WAIVER OF ATTORNEY'S LIENS

(Filed April 28, 1998)

Plaintiffs, Kyong Ju Barnett and Jessie Barnett, their attorneys of record, and each of them, pursuant to Supreme Court Rule 74.11, RSMo 511.570 and RSMo 537.675, do hereby acknowledge that the final money judgment entered in their favor against the defendants herein on April 28, 1998, in this matter has been fully and finally satisfied and that no further action in this case is required of defendants for any purpose. Defendants' tender of payment shall forever release and discharge defendants from any further obligations in this case except payment of court costs as determined in the ordinary course by the office of the Clerk of the Circuit Court of Jackson County, Missouri. Said plaintiffs and their respective attorneys further state that any and all liens for attorney fees and expenses be and hereby are expressly waived in this matter.

APPROVED AND ACKNOWLEDGED:

Dated: 4-28-98 /s/ Kyong Ju Barnett
Kyong Ju Barnett

Dated: 4-28-98 /s/ Jessie Barnett
Jessie Barnett

Dated: 4/28/98 /s/ Gary C. Robb
Gary C. Robb for himself and on behalf of Robb & Robb LLC

Dated: 4-28-98 /s/ Anita Porte Robb
Anita Porte Robb for herself and on behalf of Robb & Robb LLC

ATTORNEYS FOR PLAINTIFFS KYONG JU BARNETT and JESSIE MORGAN BARNETT

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Kyong Ju Barnett, to me personally known, who being by me duly sworn, did say that she has read the foregoing Acknowledgement of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that she has signed the same as her free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

/s/ Teresa A. Shell
Notary Public

My Commission Expires:

TERESA A. SHELL
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Jessie M. Barnett, to me personally known, who being by me duly sworn, did say that he has read the foregoing Acknowledgement of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that he has signed the same as his free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

/s/ Teresa A. Shell
Notary Public

My Commission Expires:

TERESA A. SHELL
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Gary C. Robb, to me personally known, who being by me duly sworn, did say that he has read the foregoing Acknowledgement of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that he has signed the same as his free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

/s/ Teresa A. Shell
Notary Public

My Commission Expires:

TERESA A. SHELL
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Anita P. Robb, to me personally known, who being by me duly sworn, did say that she has read the foregoing Acknowledgement of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that she has signed the same as her free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

/s/ Teresa A. Shell
Notary Public

My Commission Expires:

TERESA A. SHELL
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

KYONG JU BARNETT, et al., PLAINTIFFS v. LA SOCIÉTÉ ANONYME TURBOMECA FRANCÉ A/K/A TURBOMECA, S.A., et al., DEFENDANTS.	CASE NO.: CV93-24644 DIVISION: 8

ACKNOWLEDGEMENT OF SATISFACTION OF JUDGMENT AND WAIVER OF ATTORNEY'S LIENS

(Filed April 28, 1998)

Plaintiff Mia Kyong Barnett, a minor, by and through her guardian ad litem, next friend and duly appointed co-conservator, Kyong Ju Barnett, her attorneys of record, and each of them, pursuant to Supreme Court Rule 74.11, RSMo 511.570 and RSMo 537.675, do hereby acknowledge that the final money judgment entered in their favor against the defendants herein on April 28, 1998, in this matter has been fully and finally satisfied and that no further action in this case is required of defendants for any purpose. Defendants' tender of payment shall forever release and discharge defendants from any further obligations in this case except payment of court costs as determined in the ordinary course by the office of the Clerk of the Circuit Court of Jackson County, Missouri. Said plaintiffs state that all liens for attorney's fees and

expenses be and hereby are expressly waived in this matter.

APPROVED AND ACKNOWLEDGED:

Dated: 4-28-98 /s/ Kyong Ju Barnett
Kyong Ju Barnett, guardian ad litem, next friend and duly appointed co-conservator for Mia Kyong Barnett, a minor

Dated: 4-28-98 /s/ Gary C. Robb
Gary C. Robb for himself and on behalf of Robb & Robb LLC

Dated: 4-28-98 /s/ Anita Porte Robb
Anita Porte Robb for herself and on behalf of Robb & Robb LLC

ATTORNEYS FOR PLAINTIFF KYONG JU BARNETT, guardian ad litem, next friend and duly appointed conservator, Mia Kyong Barnett, a minor

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Kyong Ju Barnett, in her capacity as guardian ad litem, next friend, and duly appointed co-conservator of Mia Kyong Barnett, a minor, to me personally known, who being by me duly sworn, did say that she has read the foregoing Acknowledgement of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that she has signed the same as her free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

/s/ Teresa A. Shell
Notary Public

My Commission Expires:

TERESA A. SHELL
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Gary C. Robb, to me personally known, who being by me duly sworn, did say that he has read the foregoing Acknowledgement of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that he has signed the same as his free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

/s/ Teresa A. Shell
Notary Public

My Commission Expires:

TERESA A. SHELL
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Anita P. Robb, to me personally known, who being by me duly sworn, did say that she has read the foregoing Acknowledgement of Satisfaction of Judgment and

Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that she has signed the same as her free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

/s/ Teresa A. Shell
Notary Public

My Commission Expires:

TERESA A. SHELL
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000

APPENDIX B

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION 8
HONORABLE LEE E. WELLS, JUDGE

KYONG JU BARNETT, et al., Plaintiffs,	)	
vs.	)	No. CV93-24644
TURBOMECA ENGINE CORPORATION, et al., Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

On Tuesday, the 28th day of April, 1998, the above-entitled cause came on regularly for hearing before the Honorable Lee E. Wells, Judge of Division 8 of the Sixteenth Judicial Circuit, at Kansas City.

APPEARANCES

Mr. Gary C. Robb
Ms. Anita Porte Robb
Robb & Robb, L.L.C.
Attorneys at Law
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Kansas City, Missouri 64105
Attorneys for plaintiffs
Kyong Ju, Jesse, and Mia
Barnett

Mr. Craig S. O'Dear
Mr. Nicholas L. DiVita
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1200 Main Street
Kansas City, Missouri 64105
Attorneys for defendants

Katherine A. Calvert, Certified Court Reporter #304
Official Court Reporter, Division 8
Sixteenth Judicial Circuit at Kansas City

APPEARANCES
(Continued)

Mr. John J. Williams, III
Slagle, Bernard & Gorman, P.C.
Attorney at Law
600 Plaza West Building
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Kansas City, Missouri 64112
and
Mr. Duke W. Ponick, Jr.
Attorney at Law
1100 Main Street
Kansas City, Missouri 64105
Attorneys for plaintiffs
James and Wanda Barnett

Mr. Edward F. Downey
Mr. Douglas E. Nelson
Office of Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102

APRIL 28, 1998

[p. 3] THE COURT: Good afternoon, everybody.

MR. ROBB: Good afternoon, Your Honor.

THE COURT: We have this afternoon a proposed final judgment for presentation to the court in the matter of Barnett vs. Turbomeca, et al.

Are the parties ready to proceed?

MR. ROBB: We are ready to proceed on behalf of plaintiff.

MR. O'DEAR: We are ready to proceed on behalf of Turbomeca.

THE COURT: Mr. Williams.

MR. WILLIAMS: Of behalf of Jim and Wanda Barnett, we are ready.

THE COURT: And the attorney general?

MR. NELSON: On behalf of the State of Missouri, we are ready.

THE COURT: Mr. Robb, you may proceed.

MR. ROBB: May it please the court.

We have, immediately before this proceeding in open court, presented Your Honor with a copy of a proposed final judgment for execution upon a judgment for these plaintiffs and each of them in the total amount of $40,554,745 and no cents.

We believe that the proposed final judgment is a [p. 4] combination of various agreements made between and

among the parties over the course of the last two weeks, and that it also reflects all of the parties' and their counsels' respective understanding as to what the court's rulings have been concerning disputed issues.

I have also before this hearing caused to be circulated among all counsel of record a copy of the original, which the court holds, and at this time we would like to go around counsel to indicate – and I would like to indicate on behalf of plaintiffs, Kyong Ju Barnett, Jesse Barnett, and Mia Barnett, that we do believe that the final judgment is in accordance with agreements made between and among the parties or reflects rulings of this court, and we would like an announcement on the record with respect to other counsel.

MR. O'DEAR: Judge, on behalf of the Turbomeca defendants, we do acknowledge that this final judgment is in order, which is consistent with the court's rulings on these various matters.

MR. WILLIAMS: Your Honor, on behalf of Jim and Wanda Barnett, I too agree with the matters set forth in the judgment with one proviso, maybe a couple of provisos, that being that the judgment recites that [p. 5] we have withdrawn our motion to dismiss the State and our motion regarding the denomination of damages for aggravating circumstances as punitive damages.

We are withdrawing that motion upon the agreement of the State – or our understanding is the State has agreed not to appeal or seek any type of appellate relief with regard to this judgment, and so we withdraw that motion based upon that understanding; and that upon our understanding, that we would have the right to reassert

those grounds set forth in the motion in the event – in the very unlikely event we believe something should happen and this judgment should be set aside.

MR. DOWNEY: Your Honor, on behalf of the State, I would agree that this proposed order accurately represents what Your Honor indicated he would rule yesterday, and the State of Missouri is prepared to live with Your Honor's ruling, if that answers Mr. Williams' questions.

MR. ROBB: If I may proceed, Your Honor. So that we do not lose sight of what we're really about here today, the family has asked that we make a request of the court for a very brief moment of silence to honor the deceased, Jim Barnett, Jr., with the court's permission.

[p. 6] THE COURT: Permission is granted.

MR. ROBB: Thank you, Your Honor.

(Moment of silence.)

MR. ROBB: Your Honor, at this time we would ask that counsel for the Turbomeca defendants here with tender for the review and examination of the representative of the Commerce Bank the instruments which they seek to satisfy this judgment.

THE COURT: You may.

MR. ROBB: Mr. Simpson, would you identify yourself for the court.

MR. SIMPSON: Jerry Simpson, officer with Commerce Bank.

MR. ROBB: May he come to this side of the bar, Your Honor?

THE COURT: He may.

MR. O'DEAR: Sir, if you could come up front, please.

MR. ROBB: Your Honor, we ask Mr. O'Dear read the amounts into the record.

MR. O'DEAR: First of all, with regard to the payment to Kyong Ju Barnett, Jesse Barnett, and Robb & Robb, L.L.C., that total payment is $22,657,073. Nations Bank advises us that they are not able to do a cashier's check above seven figures, so we have three [p. 7] checks.

We have the first check from Nations Bank, Cashier's Check No. 2189584 in the amount of $9 million. We have check – these are all Nations Bank cashier's checks – a Check No. 2189585 also in the amount of $9 million. We have Check No. 2189587 in the amount of $4,657,073. Again, those three checks totaling $22,657,073.

The next payment tendered is to Kyong Ju Barnett, as next friend for Mia Barnett, and Robb & Robb, L.L.C. That is Check No. 2189580 in the amount of $7,552,356.

The next payment is to the parents, James Barnett, Sr. and Wanda Barnett, and their attorneys, Slagle, Bernard & Gorman, P.C. and Duke Ponick, Jr. That's Check No. 2189581 in the amount of $5,603,117.

And then the final check is to the State of Missouri, Check No. 2189582 in the amount of $4,742,199.

MR. ROBB: Your Honor, first, on behalf of our clients, Kyong Ju Barnett and Jesse Barnett, we acknowledge the tender of the checks totaling $22,657,073, and we seek permission of the court to present these to Mrs. Barnett at this time.

THE COURT: You may.

[p. 8] MR ROBB: Mrs. Barnett, would you stand up for a moment, and would you say your full name.

MRS. BARNETT: Kyong Ju Barnett.

MR. ROBB: And do you acknowledge receipt of these three checks with respect to this matter in the total of $22,657,073?

MRS. BARNETT: Yes.

MR. ROBB: Your Honor, we would ask that we be able to receive tender of the funds on behalf of Kyong Ju Barnett as next friend for the minor child, Mia Barnett.

THE COURT: All right.

MR. O'DEAR: That is Check No. 2189580 in the amount of $7,552,356.

MR. ROBB: Mrs. Barnett, in your capacity as the next friend for Mia Barnett, do you acknowledge receipt of the funds to satisfy the judgment on her behalf in the amount of $7,552,356?

MRS. BARNETT: Yes.

MR. ROBB: You may be seated now.

MR. O'DEAR: Your Honor, at this time we would ask that Mr. Robb and his clients sign the acknowledgments of satisfaction of judgments, which we have provided to them.

MR. ROBB: We agree to do so, Your Honor.

[p. 9] Your Honor, we've now signed and executed and are in the process of notarizing the acknowledgments.

At this time we would like to present to counsel for the defendants a fully executed and signed acknowledgment of satisfaction of judgment and waiver of attorneys' liens signed by Mrs. Barnett on behalf of minor child, Mia Barnett, and myself, and my law partner on behalf of our law firm, Your Honor.

MR. O'DEAR: We acknowledge receipt of this document.

MR. ROBB: Also on behalf of Mrs. Kyong Ju Barnett, her son, Jesse Barnett, myself, and my law partner, Anita Robb, for our law firm, we present to counsel for defendant Turbomeca the acknowledgement of satisfaction of judgment and waiver of attorneys' liens, Your Honor.

MR. O'DEAR: Again, we acknowledge receipt of this document as well.

MR. WILLIAMS: If you will, we'll dispense with this ceremony of doing it in this fashion. I think Mr. and Mrs. Barnett are keeping in mind the reason that we're here in the first place was occasioned by the death of their son. They have executed the acknowledgment,

and I think we can handle this in the routine fashion as far as exchanging the [p. 10] checks.

THE COURT: You want the acknowledgement on the record of course?

MR. O'DEAR: Yes.

Your Honor, at this time the Turbomeca defendants would tender to Mr. Williams and Mr. Ponick on behalf of their clients, James Barnett, Sr. and Wanda Barnett, a check for $5,603,117, Check No. 2189581.

We also acknowledge on the record the receipt of an acknowledgment of satisfaction of judgment and waiver of attorneys' liens signed by James Barnett, Sr. and Wanda L. Barnett, Duke Ponick, Jr., and John Williams for himself, and Slagle, Bernard & Gorman, L.L.C. Is that correct, Mr. Williams?

MR. WILLIAMS: That's right. It's a professional association but I think we've done all right.

MR. O'DEAR: Your Honor, the last check that we have is to the State of Missouri.

Whoever is going to accept this on behalf of the State of Missouri, could you identify yourself?

MR. NELSON: Douglas E. Nelson for the State of Missouri, Your Honor.

Teresa, if you would be so kind to notarize ours, I would appreciate it.

[p. 11] MR. O'DEAR: Mr. Nelson, if I could, I know you're an officer of the court, so I won't put you

under oath, but I have a few questions. I want to tie up the authority issue.

You've stated that your name is Douglas E. Nelson; is that correct?

MR. NELSON: That is correct.

MR. O'DEAR: Your position is what?

MR. NELSON: I'm assistant attorney general with the State of Missouri.

MR. O'DEAR: And you then work for the attorney general, Mr. Nixon?

MR. NELSON: That's correct.

MR. O'DEAR: Are you authorized by the attorney general of the State of Missouri to represent the interest of the State of Missouri in this matter?

MR. NELSON: Yes, I have been

Your Honor, I kind of feel like I'm under oath. As an officer of the court, I've been authorized, along with Mr. Downey, to sign the acknowledgment and satisfaction and accept the check for the State of Missouri.

I kind of feel like I am on the witness stand, although I'm not on the stand. I made that acknowledgment to Mr. O'Dear that we have the [p. 12] authorization of our office to sign this and accept that check on behalf of the State.

MR. O'DEAR: That's what I wanted to confirm.

And would you identify your partner here, Mr. Downing?

MR. NELSON: Edward F. Downing

MR. O'DEAR: His position is?

MR. NELSON: Also assistant attorney general for the State of Missouri.

MR. O'DEAR: He's also authorized by the attorney general of the State of Missouri to represent the State's interest in this matter?

MR. NELSON: That's correct.

MR. O'DEAR: You understand that we are tendering to the State of Missouri a cashier's check in the amount of $4,742,199, which is Check No. 2189582 in full and final satisfaction of any interest the State has or may have in this matter; is that correct?

MR. NELSON: That is correct.

MR. O'DEAR: You are accepting that on that basis?

MR. NELSON: Yes, I am.

MR. O'DEAR: We acknowledge on the record receipt of the acknowledgment of satisfaction of judgment and waiver of attorneys' liens signed by the [p. 13] State of Missouri by Douglas E. Nelson, assistant attorney general of Missouri.

MR. ROBB: We have a couple other matters. One with respect to the appeal bond. We acknowledge receipt of the motion by counsel for Turbomeca to release the appeal bond.

What we have offered to do is immediately when the officers of the Commerce Bank notify my office that the

funds have cleared and on deposit in our firm's trust account, we will immediately cause the phone call to be made to Mr. O'Dear informing him of that, and we'll also advise the court, and we ask that this court not sign the order releasing the appeal bond until those phone calls are made, Your honor.

THE COURT: I will issue the order relinquishing the appeal bond when I have been advised to do so by Mr. O'Dear, who is the attorney for the defendants, and I'll accept your word on that.

MR. O'DEAR: Okay.

MR. WILLIAMS: I take it you are waiting until all the checks have cleared?

THE COURT: Yes, until all checks have been cleared.

MR. DiVITA: Your Honor, may we present the order to the court?

[p. 14] THE COURT: Yes.

MR. ROBB: Another administrative matter. We ask counsel for defendant to supply us with a copy of the executed satisfactions of judgment.

MR. O'DEAR: We would be happy to do so, and we'll make copies as soon as the hearing is over.

I would like to say too for the record, I'm presuming everybody is going to go to the bank this afternoon. There shouldn't be any reason why anybody doesn't have the money by this afternoon.

MR. ROBB: On behalf of our client, that's our intention, Your Honor.

MR. WILLIAMS: We are too, but I'm unfamiliar with the banking rules for clearing these checks.

MR. O'DEAR: All right.

MR. ROBB: Your Honor, on behalf of our clients, Kyong Ju, Jesse, and Mia Barnett, we ask this court to sign the final judgment indicating that there has been satisfaction of that judgment in full, and then release and discharge the defendants other than the payment of court costs as reflected in the document.

THE COURT: Judgment has been executed and the costs will be taken care of by the cost department.

MR. WILLIAMS: Your Honor, if I may, I take it [p. 15] the defendants have approved the form and content of the satisfaction of judgment since you supplied it to us; is that correct?

MR. O'DEAR: Oh, yes. Yes.

THE COURT: Are you going to file those with the court?

MR. O'DEAR: Yes.

THE COURT: I want to thank everybody for the cooperation that's been shown in obtaining a final closure on this matter. It's been exceptional and I've appreciated all of the help that was received from all sides, and I'm delighted we're finally able to conclude the matter.

Thank you.

We'll be in recess.

(Adjournment.)

Supreme Court, U.S.
FILED
AUG 14 1998
OFFICE OF THE CLERK

No. 97-2072

In The

Supreme Court of the United States

October Term, 1997

TURBOMECA, S.A., and TURBOMECA ENGINE CORPORATION,

Petitioners,

v.

KYONG JU BARNETT, Individually and as Next Friend of JESSIE MORGAN BARNETT and MIA KYONG BARNETT, minor children; JAMES S. BARNETT, SR.; WANDA BARNETT; and STATE OF MISSOURI,

Respondents.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES R. LAYTON
Counsel of Record
PATRICIA A. MOLTENI
DOUGLAS E. NELSON
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Jefferson City, Missouri 65102
(573) 751-8825

Attorneys for Respondent State of Missouri

QUESTIONS PRESENTED

Because the State of Missouri only has an indirect interest in the petition's first question presented, the State will not address that question specifically in this brief. The State has a direct interest in the second question presented, as well as in a third question, not contained in the petition but a prerequisite to considering the second question:

II. Did the State of Missouri violate the Excessive Fines Clause of the Eighth Amendment when it defined, by statute, a punitive damages remedy that requires a portion of the punitive damages to be paid to the State's Tort Victims Compensation Fund?

III. Does a defendant, against whom a punitive damages award is levied, have standing to challenge the constitutionality of a state statute that does not affect the amount that the defendant must pay, but only the disposition of the funds?

REASONS FOR DENYING THE WRIT

Certiorari is not warranted to decide whether the Excessive Fines Clause of the Eighth Amendment applies to punitive damages in a civil case between private parties when the lower courts have not addressed the merits of this issue, the State has not had the opportunity to brief this issue to the lower courts, and the petition is sought by a party whose liability is not directly affected by the allegedly unconstitutional statute.

1. The petition urges this Court to grant certiorari to consider whether Missouri's law allocating a portion of punitive damages to the State, Mo. Rev. Stat. § 537.675 (1994), violates the Excessive Fines Clause of the Eighth Amendment. Yet, none of the lower courts have addressed whether the Excessive Fines Clause applies to the punitive damages awarded in this case – a civil law suit litigated by private parties.

Petitioners included this issue, along with numerous others, in their ninth point on appeal to the Missouri Court of Appeals. But in their brief on appeal, they devoted only one footnote to the question.[1] And that footnote merely said that the case "must be analyzed with regard to the Excessive Fines Clause"; it did not argue that the Missouri statute allocating punitive damages awards among plaintiffs and the state actually violated that clause.[2] It is hardly surprising, then,

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[1] Brief for Appellants in the Missouri Court of Appeals Western District at 87.

[2] Since 50% of any punitive damage award goes to the State of Missouri, this case must also be analyzed with regard to the

that Respondent Barnetts' reply brief did not respond to this footnote.

Given the lack of attention to the Eighth Amendment issue in the briefs, it was natural that the Missouri Court of Appeals acknowledged this issue only to the extent that it paraphrased the arguments raised in petitioners' brief. Appendix to Petition for Writ of Certiorari at 4-5. The Court did not actually address the Eighth Amendment issue.

Because the lower courts have not considered this Eighth Amendment issue, this Court should not accept certiorari. As it has held in the past, this Court should not review an issue without first having the benefit of developed arguments by all interested parties and lower court opinions squarely addressing the issue in the first instance. *Yee v. City of Escondido, California*, 503 U.S. 519, 537-38 (1992).

2. That is particularly true where, as here, none of the parties before the lower courts had a clear personal interest in defending the statute now being challenged. The statute did not directly affect the liability of the defendants in the

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> Excessive Fines Clause of the Eighth Amendment to the United States Constitution. Browning-Ferris Industries, 109 S.Ct. at 2914-16. See Colonial Pipeline Co. v. Wright Contracting Co., 365 S.E.2d 827 (Ga. 1988) ($5 million punitive damage award violated Georgia constitutional prohibition against excessive fines), appeal dismissed, 488 U.S. 805 (1988).

Id. at n.27.

suit, for it only addressed the allocation of punitive damages *after* award. Certainly, the plaintiffs had no reason to defend the statute, for without it they would have a claim to the entire punitive damages award. Only the State of Missouri (and its Tort Victims Compensation Fund) would be directly affected by a holding that the Missouri law was invalid.

But the State of Missouri has not had the opportunity to brief this issue to the lower courts. The State was not a party at the trial court. Nor was it a party in the appellate courts. The State became a party only *after* the Missouri Court of Appeals had issued its decision and the Missouri Supreme Court declined to review it. Thereafter, the mandate of the Court of Appeals issued and respondents accepted it, agreeing to the appellate court's remittitur in lieu of a new trial. On remand, the trial court joined the State of Missouri as an indispensable party, on motion from petitioners, because of the State's right to share in the punitive damages award. Thus, the State became a party only after all of the events and decisions that could be the subject of the petition. This Court should defer any consideration of the constitutionality of Mo. Rev. Stat. §537.675 (1994) to a case in which the constitutional issues have been briefed by all concerned parties -- including the State -- and decided below.

3. Closely related to the lack of interest of petitioners in addressing the Eighth Amendment issue below is the serious question concerning their standing to raise it here. If the statute were held to be invalid, the portion of the statute allocating payment to the Tort Victims Compensation Fund would be severed and the punitive damages award would stand. The amount of punitive damages that petitioners must pay would not change. It would be inappropriate to grant certiorari to permit petitioners to argue an Eighth Amendment question that is, to them, either of entirely academic and hypothetical interest or, more likely, is a ruse by which to

catch this Court's attention when petitioners' real purpose is to attack the amount of the punitive damages award itself.

If the Court considers petitioner's first question (regarding the amount of the punitive damages award) as justifying its attention, it should nonetheless deny the petition as to petitioners' second question (regarding the excessive fines clause). And if the Court considers the second question as meriting attention, despite the absence of its consideration below, the Court should also consider the implicit question of petitioners' standing.

CONCLUSION

For the reasons stated, this Court should deny the Petition for Writ of Certiorari filed by Turbomeca, S.A. and Turbomeca Engine Corp.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 19 1998
OFFICE OF THE CLERK

(5)

No. 97-2072

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TURBOMECA, S.A., and TURBOMECA ENGINE COMPANY,

Petitioners,

v.

KYONG JU BARNETT, Individually and as Guardian Ad Litem and Next Friend of JESSIE MORGAN BARNETT, and MIA KYONG BARNETT, minor children; JAMES S. BARNETT, SR.; WANDA BARNETT; and STATE OF MISSOURI,

Respondents.

On Petition for Writ of Certiorari
to the Missouri Court of Appeals, Western District

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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Respondents have tried to derail this Court's review of this important case by a fairly transparent distortion of the post-judgment proceedings and a blatant mischaracterization of some collateral principles of law. Despite respondents' diversionary rhetoric, the issues in this case are crisply defined and properly preserved. We will use the limited space available to dissolve the roadblocks respondents have sought to erect.

1. Respondents variously argue that the payment of the judgment by petitioners and the obtaining of a release from respondents creates a jurisdictional defect, constitutes a waiver or an accord and satisfaction, and/or moots the case. This novel proposition is not supported by Missouri or federal law or by the facts of this case. As pointed out in footnote 6 of our Petition, this Court has at least twice held that the payment of a money judgment does not render a case moot or prevent this Court from considering it. *Cahill v. New York, N.H.& H.R. Co.*, 351 U.S. 183, 184 (1956); *Dakota Co. v. Glidden*, 113 U.S. 222, 224 (1885).

Even if it could be argued that a *voluntary* payment of a judgment somehow affects its appealability, respondents do not cite any authority which suggests that payment under the threat of execution is voluntary. And *Rosenblum v. Jacks or Better of America West, Inc.*, 745 S.W.2d 754, 764 (Mo. App. 1988), pointedly held that the payment of a judgment "in lieu of posting a supersedeas bond or submitting to execution" is not "voluntary" and does not preclude appellate review. In this case, respondents threatened immediate execution, and the trial court ordered the judgment satisfied in full on the date of its entry and authorized plaintiff to begin execution immediately if such payment were not made (Pet. Apdx. A-63). No amount of linguistic inventiveness could render a payment made under those circumstances "voluntary."

The private respondents cite two Missouri cases supposedly holding that a release given by A to B prevents B from suing A;

but neither *Lugena v. Hanna*, 420 S.W.2d 335 (Mo. banc 1967), nor *Farmer v. Arnold*, 371 S.W.2d 265 (Mo. banc 1963), stands for that bald proposition or has any bearing on the issues presented here. Neither of those cases dealt with a release given to acknowledge the payment of a judgment. Rather, both were decided in the context of settlements made by participants in automobile accidents before any lawsuit was initiated. The court merely held that when one of the parties involved in a two-car accident obtained a release from the other driver before any litigation was filed and without reserving the right to file suit, he was estopped from proceeding with a lawsuit against the driver who released him. As the court in *Lugena* explained:

> "Where one of the parties to an accident is charged with liability by the other, and settles the claim or takes a release, he should not thereafter be permitted to bring or pursue his action..., since... the taking of a release *without a reservation of rights* in the releasee to make a claim against the releasor constitutes an accord and satisfaction of all claims of the parties to the settlement arising out of the same accident, and the releasee is estopped from so doing." *Lugena*, 420 S.W.2d at 341, emphasis added.

Lugena and *Farmer*, therefore, are rooted in the concept of accord and satisfaction, in which two parties essentially agree not to sue each other. That is a far cry from this case. Petitioners are not pursuing a new lawsuit against respondents, but are simply seeking review by this Court of the judgment below. The releases given by respondents in this case were not an accord and satisfaction of as-yet undeveloped claims. They were simply an acknowledgment by respondents that petitioners had satisfied all their obligations to them under the judgment and otherwise. They did not purport to release petitioners' rights against respondents, and they certainly did not represent a commitment by petitioners not to seek certiorari from this Court.

Moreover, respondents' representations concerning their understanding of the circumstances surrounding the payment of the judgment are notably false, and their citation of *Lugena* and *Farmer* overlook the significant exception to the accord and satisfaction rule that is squarely applicable here. In *Lugena*, the court emphasized that the plaintiff, in settling the matter, had not reserved the right to proceed against the defendant but noted: "Had he done so, his right thereafter to proceed against [defendant] would be protected." *Lugena*, 420 S.W.2d at 338.1/

When this case was remanded to the trial court from the Court of Appeals, respondents requested immediate entry of judgment and threatened to execute instantaneously on the supersedeas bond. Petitioners indicated their willingness to pay the judgment but requested sufficient time in which to collect the funds, mostly from international sources. In return for a short grace period, respondents argued that petitioners should be required to agree not to seek a stay of the judgment pending certiorari proceedings and also should agree not to file a Petition for Writ of Certiorari. On April 17, 1998, counsel for petitioners wrote to the trial judge indicating that petitioners would not request a stay of execution, but also stating that they would not waive their right to file a certiorari petition. The court, on the record, iterated its understanding of petitioners' position:

> "THE COURT: So it is clear, whether your client makes a determination at some point even after April 28 to file a Writ of Certiorari to the United States Supreme Court, the judgment in this matter would be satisfied in some matter [sic] on April 28. Is that your position?

1/ Likewise, in *Cahill*, 351 U.S. at 183, the Court held that the case was not moot because "petitioner was informed that respondent intended to pursue its remedies notwithstanding payment of the judgment."

"MR. O'DEAR: Yes." (Addendum, p. A-2.)[2/]

Respondents thus sought a waiver of petitioners' right to seek review in this Court but were specifically advised that no such waiver would be given. Hence, under the very cases they cite, there is no bar to this proceeding. The *Lugena* rule, even if otherwise relevant, applies only when a release is given "without reservation of rights." *Id.* at 341. Petitioners specifically reserved their rights, and this case is not moot; nor does this Court lack jurisdiction.[3/]

2. The Petition does not constitute a challenge to the Missouri Court of Appeals' interpretation of *BMW v. Gore*, but rather points out that *BMW* does not cover the punitive-damages waterfront and that other significant considerations, such as fair notice, financial wherewithal, and double punishment must be factored into the due process equation.

3. The assertion that Missouri "has provided clear notice for decades that punitive damages are available in wrongful death cases" is doubly misleading. In the first place, the Missouri Supreme Court in *Bennett v. Owens-Corning Fiberglas, Inc.*, 896 S.W.2d 464 (Mo. banc 1995), which established due process requirements for aggravating circumstances damages, expressly referred to four cases spanning the era from 1962 to 1992 which held "that aggravating circumstances damages are not to be clearly distinguished from compensatory damages in the jury

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2/ Relevant portions of the transcript of post-remand proceedings before the trial court are reproduced in the Addendum, together with pertinent excerpts from counsel's letter, which was appended as an exhibit to the transcript.

3/ Respondents' argument that petitioners have "claimed the benefits" of the judgment below by requesting a credit in the still-pending *Letz* case is specious. Petitioners are simply asking not to be punished twice for the same conduct, and it takes supreme optimism to view the outflow of $40 million as a "benefit."

instructions or stated separately in the jury verdict." *Id.* at 466. Those four cases were expressly overruled in *Bennett*. *Id.* To our knowledge, the present case was the first one in Missouri history where the jury made a separate award of damages for aggravating circumstances (a/k/a punitive damages).

Secondly, the obtuse reference to "aggravating circumstances [which] may be considered by the trier of the facts" buried in § 537.090 of the Missouri Statutes, scarcely puts one on notice of the fact that punishment can be imposed, let alone that it could reach the dimensions achieved in the present case. This is particularly true as regards Petitioner TSA, which is domiciled in a country (France) which does not allow punitive damages at all. Furthermore, the fair notice required by due process contemplates not just notice of the fact of potential punishment, but also its extent. As the Court said in *BMW*, "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receives fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 116 S.Ct. at 1598.

As demonstrated in the Petition, the present judgment, even as remitted, represents many, many multiples of the next largest wrongful death award in Missouri history. The $175 million punitive component of the original judgment was the first since Missouri statehood to be separately stated in a jury verdict, and the $26.5 million imposed by the Court of Appeals by way of remittitur was also wholly unprecedented. If there were ever a case demonstrating the lack of fair, reasonable notice, this is it.

4. In chiding petitioners for not establishing the extent of the extraterritorial reach of respondents' conduct, respondents have attempted to reverse the burden of proof. Since respondents were the proponents of punitive damages, they had the obligation to establish the elements of their case, including the impact of petitioners' actions on the State of Missouri and, conse-

quently, the extent to which Missouri was entitled to extract punishment. Instead of satisfying that burden, respondents' evidence actually showed the opposite, in that it focused exclusively on actions and supposed derelictions in other countries and other states. Respondents' own evidence established that there were no more than 250 Turbomeca engines in the United States (Ex. 248) and, from all that appears in the record, only one in Missouri.

5. Respondents' discussion of the net worth issue illustrates precisely why this Court's guidance is needed. Respondents intentionally injected other irrelevant financial figures into the record in order to justify speaking to the jury in terms of "billions" of dollars. Their use of sales figures was particularly inappropriate, as sales are not indicative of a company's financial condition. Even a company with substantial sales could have a minimal or even a negative net worth by reason of inefficiency, poor margins, cost overruns, or an uninsured casualty.

Respondents also attempted to distort the net worth issue at trial with an amateurishly erroneous calculation that produced a figure of $200 million, as distinguished from the $122 million figure contained in TSA's financial reports. It is not difficult to produce competent testimony on net worth, so the "fuzziness" hypothesized by respondents is illusory. But even if their net worth figure were accurate, the punitive award here is still 13.25% of that number, and the combined assessments in *Letz* and *Barnett* equal 26.5% — far beyond any penalty approved in any prior reported case.

6. Respondents suggest that the presence of insurance mitigates the excessiveness of the punitive damage punishment. The existence of insurance (which was never before the jury) is irrelevant because (a) execution could still be sought against the insured's assets, and (b) if the insurer pays the judgment, the insured will surely suffer significantly when the next premium

adjustment occurs. Indeed, in the pending *Letz* case, the plaintiffs (represented by the same counsel) acknowledged: "...defendants would still be punished to the extent they could not obtain future insurance coverage or, if so, only at a substantially higher rate, as well as the negative impact to defendants of an adverse judgment given the highly competitive nature of the world-wide helicopter engine industry, and harm to the stock value of the companies." Resp.Br., Mo. Sup.Ct. No. 80558, p.86 n.50.

7. The brief in opposition filed by the State of Missouri is perplexing because it is addressed to a non-issue. Petitioners have not challenged the constitutionality of §537.675.2, which allows the State of Missouri to collect 50% of the punitive damages awarded. Rather, the point is that the State's participation in the award triggers an examination of the extent of the punishment under the Excessive Fines Clause. The State's arguments are way off target.

On the very day our Petition was filed, this Court more precisely defined the reach of the Excessive Fines Clause in *United States v. Bajakajian*, 118 S.Ct. 2028 (June 22, 1998). There the Court held that a punitive forfeiture violates the Excessive Fines Clause if it is "grossly disproportional to the gravity of the defendant's offense." *Id.* at 2038. Contrary to the private respondents' observation, this test is not duplicative of the *BMW* due process analysis, but focuses on the ratio between the fine extracted by the State and the gravity of the defendants' misconduct which is being punished.

Since punitive damages admittedly constitute punishment, *Bajakajian* teaches that the Excessive Fines Clause necessitates a proportionality review when the State participates in the recovery, as it does in Missouri and at least eight other jurisdictions. If the guilty criminal defendant in *Bajakajian* could not be required to forfeit $357,144, it is hard to see how a penalty of

more than 74 times that amount can be constitutionally levied against a civil defendant who has never been charged with a crime, never been sued previously for product defect, and never before been involved in a fatal accident.

* * * *

Once the artificial hurdles erected by respondents are cleared away, this case emerges as a prime candidate for this Court's review so that some additional, badly-needed Constitutional clamps can be placed on the random redistribution of wealth still being carried out around the country under the rubric "punitive damages."

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

August 19, 1998

ADDENDUM

ADDENDUM

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION 8
HONORABLE LEE E. WELLS, JUDGE

No. CV93-24644

KYONG JU BARNETT, et al.,
Plaintiffs,

vs.

TURBOMECA ENGINE CORPORATION, et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

On Thursday, the 16th day of April, 1998; Friday, the 17th day of April, 1998; and Tuesday, the 28th day of April, 1998, the above-entitled cause came on regularly for hearing before the Honorable Lee E. Wells, Judge of Division 8 of the Sixteenth Judicial Circuit, at Kansas City.

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* * * *

[58] MR. O'DEAR: Judge, I did send to Your Honor this morning a letter dated April 17th. It is in your court file. Frankly, I would like for purpose of absolute clarity for the record to mark your copy of the letter as another exhibit in this hearing.

(Court's Exhibits Nos. 4 and 5 were marked for identification.)

MR. O'DEAR: This one page of the transcript from yesterday says nothing more than what is recited in this letter. We understood clearly that your question to us was whether we were able to agree on behalf of our clients to both of these conditions, and for the reasons that we have explained in this letter, we are unable to waive at this time the right to file a **[59]** cert petition with the U.S. Supreme Court.

I want to make clear on the record, as I said in this letter, that they haven't decided if they are going to do it. The posture of this decision came to them after last week when they asked us, okay, how much time do we have to decide this issue? It is a 90-day deadline. We've had a lot of issues to deal with, and as I advised this court yesterday, their position was, if we can get until April 28th to pay this judgment in the ordinary course, we do not intend to seek a stay for the purpose of filing the cert petition, but we don't know yet whether we'll file the actual cert petition, and we're going to have to work on that and let you know.

THE COURT: So it is clear, whether your client makes a determination at some point even after April 28 to file a writ of certiorari to the United States Supreme Court, the judgment in this matter would be satisfied in some matter on April 28th. Is that your position?

MR. O'DEAR: Yes.

* * * *

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17 April 1998

VIA HAND DELIVERY

The Honorable Lee E. Wells
Circuit Court Judge - Division 8
Jackson County Courthouse
415 E. 12th Street
Kansas City, Missouri 64106

Re: *Barnett, et al. v. Turbomeca Engine Corporation, et al.*
Case No. CV93-24644

Dear Judge Wells:

This letter will advise the Court and the parties of the position of the Turbomeca defendants on the issues remaining open at the end of the hearing on Thursday, 16 April 1998.

First, we advised our clients that the Court indicated its inclination to delay entry of final judgment until 28 April 1998 (the date by which I told the Court the defendants would be able to satisfy the judgment) if the defendants would represent to the Court that they would not 1) move for a stay of execution for the purpose of filing a petition for certiorari with the United States Supreme Court, or 2) file a petition for certiorari with the United States Supreme Court. Our clients' position on this is as follows: The Turbomeca defendants continue to agree (as I represented to the Court on Thursday) that if the Court will postpone entry of judgment until 28 April 1998, they will not move for a stay of

execution for the purpose of filing a petition for certiorari to the United States Supreme Court. The next question is whether, in order to ensure that the Court delays entry of judgment until 28 April 1998, will the Turbomeca defendant waive their right to file a petition for certiorari to the United States Supreme Court? The answer to that question is that at this time we are unable to waive Turbomeca's right to file the petition for certiorari. The following explains why we are unable to do so.

After the Missouri Supreme Court issued its order refusing to review *Barnett,* we advised our clients that the petition for certiorari to the U.S. Supreme Court could be filed at any time within ninety days of the Missouri Supreme Court's refusal to review the case. Because of the length of this deadline, because of the complexity of the analysis and decision concerning the filing of such a petition, and because of the logistical complexity of obtaining input from all members of the consortium concerning such a decision, the clients have done very little to evaluate this issue. When we called them yesterday after our conference in chambers and asked whether they had finally decided the certiorari issue and whether they could waive the right to file the certiorari petition to ensure entry of judgment on 28 April 1998, they advised us that the decision had not yet been made and further, it could not be made in 24 hours (which is what we requested). Frankly, given the 90 day period the U.S. Supreme Court allows for filing such a petition and the other factors described above, the decision may not be made until after 28 April 1998.

* * * *

Very truly yours,

/s/ Craig S. O'Dear
Craig S. O'Dear